Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Tadeusz Tarapacki,
Petitioner,

v.

New Jersey ReInsurance Company,
Respondent.

On Petition for a Writ of Certiorari to
The Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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87 pp

Questions Presented

A Pennsylvania resident, injured in a Pennsylvania industrial accident, seeks to enforce a rendered Pennsylvania workers' compensation award in the State of New Jersey pursuant to the Full Faith and Credit clause of the United States Constitution; however the State Courts in New Jersey refused to fully enforce the award, limiting enforcement to those benefits that the Pennsylvania resident would have received under New Jersey law, implicitly deciding an insurance coverage issue being concurrently litigated in Pennsylvania.

The questions presented are these:

1. Consistent with the requirements of the Full Faith and Credit clause of the United States Constitution, can the State of New Jersey apply New Jersey law to a Pennsylvania industrial accident involving a Pennsylvania employee, where New Jersey has no significant contact, or aggregate contacts, with the subject litigation?

2. Consistent with the Due Process clause of the United States Constitution, can the State of New Jersey apply New Jersey law to a Pennsylvania resident involved in a Pennsylvania industrial accident simply because the employer and insurance carrier have offices in the State of New Jersey?

3. Consistent with the Full Faith and Credit clause of the United States Constitution, should the State of New Jersey be allowed to litigate an issue already being contested in the State of Pennsylvania after the Pennsylvania litigation had already commenced and ignore a judgement issued in that same proceeding?

Statement of Parties and Rule 29.6 List

Tadeusz Tarapacki is a natural person and New Jersey ReInsurance Company is a subsidiary of New Jersey Manufacturer's Insurance Companies, a New Jersey corporation.

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The order of the New Jersey Supreme Court, denying review is reproduced in the appendix attached hereto, "Pet. App." at 1a. The written opinions of the New Jersey Superior Court, Appellate Division, affirming the trial court's grants of summary judgement are reproduced in the appendix, Pet. App. 2a-12a and 13a-20a. The oral opinion of the New Jersey Superior Court, Law Division, granting summary judgement is reproduced in the appendix, Pet. App. 21a-42a. The opinion of the Pennsylvania Workmen's Compensation

Bureau is reproduced in the appendix, Pet. App. 48a-52a.

Statement of Jurisdiction

The order of the New Jersey Supreme Court, denying review was filed on October 22, 1996. This petition is being filed under Supreme Court Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257.

Constitutional and Statutory Provisions Involved

The pertinent constitutional provisions are Full Faith and Credit clause embodied in Article IV, Section 1, of the United States Constitution which provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved.

And the Due Process clause of the Fourteenth Amendment of the United States Constitution, which provides in relevant part:

> No State shall . . . deprive any person of . . . property, without due process of law, . . ."

The relevant Pennsylvania statutory provision at issue is 40 P.S. Sec 813, which provides:

> Except for non-payment of premiums, no policy of insurance issued or renewed against liability under the . . . "Pennsylvania

> Workmen's Compensation Act" . . . may be canceled or terminated by an insurer during the term of the policy.

Statement of the Case

This matter concerns an attempt by a Pennsylvania resident to enforce a Pennsylvania workers' compensation award in the state of New Jersey against a New Jersey insurance carrier.

On September 21, 1988, Diversified Contracting, Inc. (Diversified), through its Pennsylvania insurance agent Braishfield Associates, Inc. (Braishfield), applied for designation of an insurance company to provide workers' compensation coverage through New Jersey's Workers' Compensation Insurance Plan ("the Plan"). At the time of application, Diversified paid an insurance premium for one year's coverage. The Plan designated New Jersey Re-Insurance (NJRe) as the Plan carrier and on November 5, 1988, NJRe issued an insurance policy through the Pennsylvania agent to Diversified covering work related injuries between November 5, 1988, and November 5, 1989. Included in the policy was a provision for other states insurance coverage ("Other States Coverage"). That contract provision reads as follows:

> 1. This other states insurance applies only if one or more of the states are shown in item 3.C. of the Information Page.
>
> 2. If you begin work in any one of those states and you are not insured or

> are not self-insured for such work, the policy will apply as though that state were listed in item 3.A. of the Information page.
>
> 3. We will reimburse you the benefits required by the workers' compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.
>
> B. Notice
> Tell us at once if you begin work in any state listed in item 3.C. of the information page.

Section 3.C. of the Information Page listed "New Jersey" while Section 3.A. of the Information Page listed "ALL STATES EXCEPT NV, ND, OH, WA, WV, WY, TX, NJ." It is undisputed that NJRe's policy, as issued, provided insurance coverage to Diversified against Pennsylvania industrial accidents.

On November 17, 1988, NJRe sent a questionnaire directly to Diversified's New Jersey office seeking additional information. In response to a question seeking information regarding Diversified's work site locations, Diversified advised NJRe that it performed work in "Pennsylvania, Delaware, [and] Maryland." By letter, dated January 20, 1989, NJRe informed Braishfield in Pennsylvania, but not Diversified, that based on the responses to the November questionnaire, NJRe intended to issue an endorsement, excising the Other States Coverage from the insurance contract. On January 31, 1989, NJRe mailed the promised endorsement to Braishfield in Pennslyvania. The January 31, 1989, endorsement was never

sent to Diversified.

On March 20, 1989, Tarapacki, a Pennsylvania resident was injured on the job while working for Diversified in Philadelphia, Pennsylvania. On April 13, 1989, Tarapacki filed a workers' compensation claim with the Pennsylvania Department of Labor and Industry, Bureau of Workers' Compensation ("the Bureau"). Once Diversified received the claim, they contacted Braishfield who was in turn advised by NJRe that Diversified was not covered for Pennsylvania accidents. Consequently, Diversified returned the claim to the Bureau indicating that it had no insurance. A copy of the correspondence was sent to NJRe. Judgment was entered by the Bureau against Diversified and Diversified was fined for failing to maintain workers' compensation coverage in Pennsylvania. Tarapacki brought an enforcement action under the Full Faith and Credit clause of the United States Constitution, in New Jersey, seeking enforcement of the Pennsylvania judgment against Diversified (the "Enforcement Action"). After Tarapacki filed the Enforcement Action, he appealed the Bureau's "no-insurance" ruling in Pennsylvania to the Commonwealth Court of Pennsylvania.

In the Enforcement Action, Tarapacki initially secured default judgement which Diversified was able to get set aside. Diversified answered and filed a third party claim against NJRe, seeking, *inter alia*, declaratory judgement compelling NJRe to provide workers' compensation benefits to Tarapacki, as required by the Pennsylvania judgment.

On June 12, 1992, the New Jersey Superior Court, Law Division, granted summary judgment in favor of NJRe, reasoning that the determination of "no insurance" made by the Pennsylvania Bureau of Workers' Compensation (then on appeal), was *res judicata* to Diversified's claim on the third

party complaint. After the grant of summary judgment, Diversified assigned all of its rights under the subject policy to Tarapacki and Tarapacki appealed Law Division's ruling to the New Jersey Superior Court, Appellate Division.

On April 14, 1994, the Pennsylvania Commonwealth Court reversed the initial "no insurance" ruling of the Bureau and remanded the matter to allow Tarapacki to litigate the issue of whether Diversified had insurance coverage for the plaintiff's work related injury. On July 20, 1994, the Appellate Division reversed the Law Division's grant of summary judgment in the Enforcement Action and remanded it back to the Law Division with the "recommendation" to await the determination of Tarapacki's litigation of the insurance issue in Pennsylvania.[1]

On May 24, 1995, the New Jersey Superior Court, Law Division, granted NJRe's second motion for summary judgment ruling that under New Jersey law, the January 31, 1989, endorsement effectively removed Other States Coverage prior to Tarapacki's accident. The Law Division further ruled that plaintiff was only entitled, under the terms of the modified insurance contract, to benefits payable under the New Jersey Workers' Compensation Act. The Law Division referred the matter to the New Jersey Division of Workers' Compensation for a determination of benefits payable to plaintiff under New Jersey law. The Law Division rejected Tarapacki's argument that Pennsylvania law precluded cancellation of the Other States Coverage.[2]

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[1] NJRe never appealed this determination.

[2] Tarapacki specifically argued, *inter alia*, that Pennsylvania law should be applied in the Enforcement Action

On June 8, 1995, Tarapacki filed a motion for leave to appeal with the New Jersey Superior Court, Appellate Division. On July 12, 1995, the Appellate Division determined that Tarapacki's motion should be treated as a notice of appeal from a final judgment and accepted the parties motion papers as merit briefs with leave to file supplemental briefs. On April 29, 1996, the matter was argued before the Appellate Division.

On May 16, 1996, after a factual hearing, the Pennsylvania Bureau of Workers' Compensation ruled that Pennsylvania law should be applied to the matter and under 40 P.S. Sec. 813, the Other States Coverage could not be canceled for any reason except for non-payment of premiums, hence, NJRe's policy did provide coverage for plaintiff's accident.

On May 29, 1996, Tarapacki moved to include the Bureau's decision in the appellate record before the Appellate Division. [3] On June 16, 1996, the Appellate Division denied Tarapacki's motion. On June 17, 1996, the Pennsylvania Workmen's Compensation Appeal Board denied NJRe's petition for a supersedeas bond. On June 18, 1996, the New Jersey Superior Court, Appellate Division, affirmed the lower court's ruling. On October 23, 1996, the New Jersey

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and that the Other States Coverage could not be canceled under 40 P.S. Sec. 813, for any reason except for non-payment of premiums.

[3] Plaintiff requested the inclusion of the Pennsylvania decision arguing that the Pennsylvania judgement should be accorded Full Faith and Credit as a valid judgement of a sister state.

Supreme Court denied review of the Appellate Division's decision.

Petitioner now seeks a writ of certiorari from this Court.

Reason for Granting the Writ

This case illustrates the perennial problems inherent in a federalized judicial system where one case is allowed to be litigated concurrently in two separate jurisdictions without clear guidance as to how the separate proceedings should be integrated into a single result.

In this case, a Pennsylvania resident, granted judgement by the state of Pennsylvania under the laws of Pennsylvania,[4] sought enforcement of that judgement in the neighboring state of New Jersey pursuant to the Full Faith and Credit clause of the United States Constitution.[5] The New Jersey Courts, merely asked to enforce the judgement(s) rendered in Pennsylvania, reasoned that they were free to

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[4] The Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. Sec. 1-1031. It is clear the Bureau's rulings, both as against Diversified and NJRe, were entitled to Full Faith and Credit since the Bureau was acting in its judicial capacity. *United Farm Workers of America, AFL-CIO v. Arizona Agr. Empl. Bd.*, 669 F.2d 1249 (CA9 1981). This is so even during the pendency of any appeal. *Brinker v. Page Realty Corp.*, 1 Cal.Rptr.2d 358, 235 Cal.App.3d 1296 (Cal.App. 2nd Dist. 1991).

[5] U.S.Const. Art IV, Sec 1.

ignore application of Pennsylvania law and limited recovery for the litigant to remedies available under New Jersey law. Because New Jersey's highest court has denied relief, and because Petitioner is required to bring this application if he wishes to preserve his rights in the Pennslyvania judgement, Petitioner now brings this petition.[6]

Supreme Court Rule 10.1 indicates that a writ of certiorari may issue to a state court where the state court has decided an important question of federal law in a way which conflicts with applicable decisions of this Court.

In this case, the New Jersey Superior Court has rendered a ruling on the application of the Full Faith and Credit clause which is incongruent with this Court's established jurisprudence. Regrettably, the New Jersey courts are not alone in their insolence, as a growing number of states are refusing to accord constitutionally mandated deference to

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[6] This Court's prior pronouncements have made it clear, that in order for litigant to preserve his rights in an ignored judgement, he must pursue his appellate prerogatives up to this Court. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 77 (1939); *Morris v. Jones*, 329 U.S. 545, 552 (1946) (" whatever might have been the ruling on the question, the rights of the Parties could have been preserved by resort to this Court, which is the final Arbitrator of questions arising under the Full Faith and Credit Clause"); *See also*, R.B. Ginsberg, *Judgements In Search of Full Faith and Credit: The Last-In-Time rule for Conflicting Judgements*, 82 Harvard L.Rev. 798, 807-808 (1969), and, W.H. Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L.Rev. 412, 416 n. 31 (1994)(Both recognizing the judicially created preservation requirement).

their sister states. *See, e.g.*, Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U.Pa.L.Rev. 381, 391-400 (1985), and, Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U.Chi.L. Rev. 400, 467-68 (1982). Moreover, there is a growing problem where neighboring jurisdictions ignore the parallel proceedings of their sister states and engage in an unseemly "race to judgement".

Because exercise of this Court's jurisdiction will have positive impact in assuring that individual states act as members of a single "great political family" rather than federation of independent sovereigns, Tarapacki prays this Court to grant a writ of Certiorari to the New Jersey Superior Court, Appellate Division, and list this matter for consideration on the merits.[7]

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[7] This Court recognized in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 590 (1939), that,

> [t]he intimate union of these [United] States, as members of the same great political family; the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations.

Compare, *Johnson v. Muelberger*, 340 U.S. 581, 584 (1950)("[L]ocal policy must at times be required to give way, such 'is part of the price of our federal system'")(quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1947)).

Point I

Because New Jersey did not have any significant contacts to the accident in this case, it was an error for the New Jersey State Courts to apply New Jersey Law in this case.

In this case, the New Jersey Superior Court, Appellate Division, affirmed the trial court's ruling that New Jersey law would be applied in Tarapacki's Enforcement Action. Consequently, Pennsylvania's no cancellation statute was subordinated to New Jersey's more liberal cancellation common law, allowing NJRe to cancel its Other States Coverage for reasons other than non-payment of premiums. Because New Jersey has no significant contacts to the involved claim, the Appellate Division's determination was flawed on a constitutional level.

The framers of the Constitution, concerned with harmonious and consistent relations between the states, insisted, by way of inclusion in the constitution, that "Full Faith and Credit shall be given in each State to the public Acts, . . . of every other State." It is beyond question that state workers' compensation acts are "public acts" for purposes of the Full Faith and Credit clause. *U.S.Const.* Art IV, Sec. 1. *Bradford Electric Co. v. Clapper*, 286 U.S. 145, 155 (1931). Hence any state court required to chose between the application of its workers' compensation statute or the workers' compensation statute of a sister state, must do so in a manner consistent with the Full Faith and Credit clause.

In *Allstate Insurance Company v. Hague*, 449 U.S. 302, 312-13 (1981), this Court held "that for a State's

substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." As a general rule, a state has a *prima facie* right to enforce its own statutes. However, that right could be overcome if the competing state interest, underlying a conflicting statute in a sister state, is superior to the relevant state interest in the forum state. *Bradford*, *supra*, at 157.[8]

In *Bradford*, for example, this Court held Vermont's interest in regulating state created employment relationships involving its residents was superior to the interest that New Hampshire had in work related accident occurring within its boarders. *Id.*, at 156-62. Similarly in *Alaska Packer's Assn. v. Industrial Accident Comm. of Cal.*, 294 U.S. 532 (1935), this Court held that California's interest in regulating accidents involving residents, even where the accident occurs outside of the state, was superior to Alaska's interest in policing work related accidents involving temporary seasonal out of state employees within its state boundaries. Finally, in *Allstate*, *supra*, this Court held that the insurance claimant's employment in Minnesota, his daily commute to and from

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[8] Professor Pielemeier has commented that "[t]he Justices have never satisfactorily explained how the current choice of law test, or the respective interpretations of the requisite state interest, relate to and further values implicit in the constitutional provisions the Justices are purporting to apply. This is particularly true with respect to the Full Faith and Credit Clause." Pielemeier, *supra*, at 1310 (footnote omitted). Such commentary suggests, as least among academicians, that this Court's prior pronouncements have left a margin of confusion in this area of the law.

Minnesota, and the insurance carrier's presence in Minnesota were contacts (in the aggregate) that were significant enough to justify application of the Minnesota insurance law by a Minnesota trial court over the application of Wisconsin state insurance law, even though the claimant resided in Wisconsin and the insurance contract was delivered in Wisconsin. *Id.*, at 313-15.

In contrast, this Court in *Home Ins. Co. v. Dick*, 218 U.S. 397 (1930), and, *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), found the asserted contacts insufficient to justify application of the forum state's law. In *Home Ins. Co. v. Dick*, a Texas trial court applied Texas law to void a limitation clause within the subject insurance contract, even though the only contact Texas had with the subject litigation was the fact that the plaintiff was a nominal resident of the state when he brought the action. This Court in reversing, held that mere domicile in the forum state alone was insufficient to justify application of Texas state law. *Id.*, at 402. Similarly, in *Yates*, plaintiff sued her deceased husband's insurance carrier on a contract that was created in New York and where the claim upon the insurance contract arose while the decedent lived in New York. After her husband's passing she moved to Georgia, seeking application of Georgia law to the dispute. This Court held that a postoccurrence change in residence would not justify application of Georgia law over that of a conflicting New York statute.

The starting point in determining the competing state interests would be an examination of the competing legislative enactments themselves. *Moskel v. United States*, 498 U.S. 103 (1990). A second source would be the interpretation of the relevant enactments provided by the respective state courts in the past. *Alaska Packers Assoc.*, *supra*, at 541, and

Bradford, *supra*, at 158. Predictably, the underlying purpose for both New Jersey and Pennsylvania's workers' is to compensation schemes substitute any common-law remedy an employee may have against the employer in connection with an industrial accident with an administrative no-fault remedy providing the employee with necessary medical treatment and compensation for lost wages. *Seltzer v. Isaacson*, 147 N.J.Super. 308, 371 A.2d 304 (App. Div. 1977); *Wagner v. National Indem. Co.*, 492 Pa. 154, 422 A.2d 1061 (1980). A second social purpose was to incorporate the costs of work-related injuries back into the cost of goods or services through insurance premiums. *Hale v. Savage*, 75 Pa.Super. 454 (1921); *See also*, J. L. Gelman, 38 *New Jersey Practice: Workers' Compensation*, Sec. 1.1 (1994); and, D.B.Torry, WCJ, *Pennsylvania Workers' Compensation: Law and Practice*, Sec. 1.10 (1996).[9]

In this case, Tarapacki's residence and employment in Pennsylvania gives that state significant contacts with Tarapacki's cause of action under this Court's holding in *Alaska Packer Assoc.*, *supra*. Moreover, because of Tarapacki's continued residence in Pennsylvania, that state bears the risk that Tarapacki would become a public charge because of his accident; therefore, Pennsylvania, not New Jersey, would ultimately bear the burden of the work related accident. Finally, Pennsylvania, not New Jersey, has legitimate concerns about industrial accidents within

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[9] An ancillary benefit to a workers' compensation system is to ensure that those employees that are injured in work related accidents do not ultimately become a public charge. *General Motors Acceptance Corp. v. Falcone*, 130 N.J. Super. 517, 327 A.2d 699 (Dist. Ct. 1974); *Glen v. State Workmen's Ins. Fund*, 133 Pa.Super. 121, 2 A.2d 32 (1938).

Pennsylvania boarders.

The two contacts cited by the trial court in this case to justify application of New Jersey law were insignificant under the Full Faith and Credit analysis endorsed by this Court. The first factor considered by the trial court, *i.e.* the presence of the employer in the forum state, was deemed insufficient by this Court in *Pacific Employers Ins. Co. v. Industrial Accident Comm. Of California*, 306 U.S. 493 (1938). Similarly, the *Hague* Court suggests that the mere fact that a contract of insurance was delivered in a given state does not create a significant contact. Both of these holdings make sense since the location of an employer's administrative office may have little if any relation to the location of actual work activity and the location of an insurer may have little, if any, relation as to the location of the insured risk. Finally, since NJRe's initial policy included the Other States Endorsement, it is clear that they expected, and assumed, the risk of Pennsylvania industrial accidents. *Hague, supra*, at 317-18.

A fair evaluation of the contacts that Pennsylvania and New Jersey had with the subject litigation reveals that only Pennsylvania has any constitutionally significant contacts with the subject litigation.[10]

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[10] Even if the lower court were to employ the "better law" approach articulated by Professor Leflar, it is urged that Pennsylvania law would still have to be applied in this case. Under the approach urged by Professor Leflar, if a court is faced with a choice of law question and there is an actual conflict between the application of the two statutes, the Court is then to determine which competing statute is the better of two rules. Lefar, *Conflicts of Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584,

Point II

Because the Petitioner has no significant contacts to the State of New Jersey, it was fundamentally unfair for the New Jersey State Courts to apply New Jersey Law in this case.

While the inquiry on a Full Faith and Credit choice of law analysis focuses on whether the forum state has sufficient contacts to justify application of the forum state's substantive law over that of a competing law in a sister state, the appropriate inquiry on a due process choice of law evaluation is whether the party resisting application of the forum state's law has sufficient contact with the forum state to justify the exercise by the forum state of its laws over the burdened party. As recognized by Justice Stevens, in *Hague*, "the two

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1587 (1966); *But see*, J.A. Martin, *Constitutional Limitations on Choice of Law*, 61 Cornell L. Rev. 185, 193-94 (1976)(criticizing the "better law" rule as unworkable since federal courts would arguably be drawn into legislating which state law is better). The rule endorsed by Pennsylvania is once a policy is issued, it can not be withdrawn or canceled for any reason except for non-payment of premiums. The rule applied by the New Jersey courts was the insurance carrier could cancel the policy for any reasons, or no reason, by simply mailing an excise endorsement to the insured's agent. Pennsylvania's rule would seem to further both policy concerns underlying its workers' compensation laws of both states while the rule adopted by the New Jersey courts in this case further none of the relevant policy objectives but only served to further the financial interests a local insurance carrier.

constitutional provisions[, Due Precess and Full Faith and Credit,] protect different interests and that proper analysis requires separate consideration of each." *Hague, supra*, at 322 (Stevens, J. Concurring).

Whereas the framers incorporated the Full Faith and Credit clause to protect each state from incursions into individual state autonomy by sister states, the Due Process clause was incorporated into the Federal Constitution by amendment to guard individuals against arbitrary state action. *Missouri Pac R. Co. v. Humes*, 115 U.S. 512 (1885). The Due Process clause was the basis for this Court's decision in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

In *Dick*, this Court was called upon to review the application of Texas law upon a New York insurance carrier for a risks located in Mexico. The plaintiff was an assignee of an insurance policy that insured a tug boat in Mexican Waters. The insurance contract contained a clause requiring that any action for recovery be brought within one year of loss and had a choice of law provision requiring application of Mexican law. *Id.*, at 403. The plaintiff, then residing in Texas, filed suit and then urged the trial court to apply Texas law which struck down, as against Texas public policy, any contractual limitation period of less than two years. The insurance carrier and the original insured had no contacts with the state of Texas and the only real contact between the suit and Texas was the presence of the plaintiff in Texas at the time of filing though he was a Mexican resident at the time of the loss and the presence of the insurance carrier's agents in Texas. *Id.*, at 408. This Court found it a violation of the carrier's due process rights to impose Texas law in a case where the carrier had no significant connection with the forum state. *Ibid*; *Cf.*, *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934).

In the past, this Court has upheld the application of forum state law upon a foreign litigant, based on the activities conducted by the litigant in connection with the forum state. *See, e.g.*, *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), and, *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964). In *Watson*, the plaintiff purchased the insured's product and was ultimately injured by the insured's product in Louisiana. The manufacturer's insurance contract contained a clause precluding any direct action against the carrier. The Louisiana trial court applied Louisiana's direct action statute in the case, thereby nullifying the contested contract provision. In affirming the actions of the Louisiana court, this Court held that the insured's marketing efforts throughout the United States and Canada created sufficient contacts between the insured--thereby the insured's carrier--and Louisiana to justify application of Louisiana law. Similarly, in *Clay*, where the are adequate contacts between the forum state and the foreign litigant, application of the forum's law would not offend due process. *Clay, supra*, at 183.[11]

In this case, Tarapacki had virtually no contacts with the State of New Jersey that would justify application of New Jersey law in his case by the New Jersey courts. He resided in Pennsylvania, worked in Pennsylvania, became injured in Pennsylvania, and is now suffering the effects of his work

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[11] This Court's jurisdictional limitation rules formulated under *in personam* jurisprudence provides a healthy comparison to the due process concerns in the choice of law area. *See*, Kurland, *The Supreme Court Due Process Clause and In Personam Jurisprudence of State Courts--From Pennoyer to Denckla: A Review*, 25 U. Chi. L. Rev. 569 (1958).

related injury in Pennsylvania. With the exception of the fact that his employer and his employer's worker's compensation carrier had offices in the State of New Jersey, neither being a fact which he had control over, he had no connection with the State of New Jersey. Because Tarapacki had virtually no contacts with the State of New Jersey, it was an error of constitutional magnitude under the Due Process clause of the United States Constitution for the New Jersey Courts to impose New Jersey law in this case.

Point III

The failure of the New Jersey Courts to afford Full Faith and Credit to the Pennsylvania proceedings, violated the Full Faith and Credit Clause.

In drafting our federal constitution, the founding fathers were concerned not only that the individual state laws would be respected by sister states, but they also concerned judicial proceedings of the individual states would be respected, hence they provided in the Constitution that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." *U.S.Const.* Art IV, Par. 1. The actions of the New Jersey Superior Court, Appellate Division, failed to follow this mandate by failing to abstain from ruling on the coverage issue while Pennsylvania was determining the issue and by ignoring Pennslyvania's determination once it was rendered; therefore, this Court will be urged to grant petitioner's request for a writ in this case.

(a) Because the "insurance ruling" by the Pennsylvania

Worker's Compensation court was rendered after the New Jersey State Court determination of the same issue, under the "last-in-time" rule articulated by this Court, the New Jersey Superior Court, Appellate Division, erred in not affording the Pennsylvania ruling *res judicata* effect.

In a series of four cases, this Court developed a rule of thumb that provides that where there are inconsistent judgements, the Full Faith and Credit clause of the United States Constitution requires that the last judgement in time should be given effect over previous determination of the same issue. *See*, *Dimock v. Revere Copper Co.*, 117 U.S. 559 (1886); *Treinies v. Sunshine Mining Co.*, 308 U.S. 77 (1939); *Morris v. Jones*, 329 U.S. 545 (1947); and *Sutton v. Leib*, 342 U.S. 402 (1952); *See*, *also*, R.B. Ginsburg, *Judgements in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgements*, 82 Harvard L. Rev. 798, 800-811 (1969).

In the case of *Dimock v. Revere Copper Company*, Dimock was sued by Revere Copper Company (Revere) in a Massachusetts state court on a series of notes. 117 U.S. at 560-61. During the Massachusetts litigation, Dimock sought and received a bankruptcy discharge in the federal district court of Massachusetts. *Ibid.* The bankruptcy discharge was not brought to the attention of the Massachusetts state court and judgement on the notes was entered for Revere. When Revere sought to enforce the Massachusetts judgement in New York, Dimock asserted a Full Faith and Credit defense.

In rejecting Dimock's defense this Court observed that Dimock failed to bring the bankruptcy discharge to Massachusetts state court's attention, hence he was not entitled to Full Faith and Credit protection. *Id.*, at 565-56. In *Treinies v. Sunshine Mining Co.*, *supra*, this Court extended the obligation of a party seeking Full Faith and Credit protection, by requiring the asserting party to litigate that claim all the way to this Court by way of petition for certiorari. 30 U.S. at 77.

The last-in-time rule was again vindicated by this Court in *Morris v. Jones*, *supra*. In *Morris*, the plaintiff sued an insurance carrier, Chicago Lloyds, on malicious prosecution and false arrest claim in a Missouri state court. 329 U.S. 547. After the commencement of the Missouri action, Chicago Lloyds entered insolvency proceedings in Illinois. Notwithstanding a stay order directed to the plaintiff, he continued the Missouri action to judgement and offered an exemplified copy of the Missouri judgement as proof of his claim in the Illinois liquidation proceedings. *Ibid.* The Illinois state courts refused to grant the Missouri judgement Full Faith and Credit and this Court reversed reasoning that Chicago Lloyds should have asserted the stay order in the Missouri proceedings; since the Missouri court had complete jurisdiction over the matter, its determination of the matter was final between the parties. *Id.*, at 552.

Finally, in *Sutton v. Leib*, this Court noted that fundamental defects in the rendering court's judgement could preclude application of the Full Faith and Credit clause. In the *Sutton* case, the plaintiff, Ms. Lieb had married a Mr. Walter Henzel directly after Mr. Henzel secured a Reno, Nevada (ex-parte) divorce from his wife, Ms. Dorothy Henzel. 342 U.S. 405. Ms. Lieb's marriage to Henzel cut off her alimony payments granted in her previous divorce. *Ibid.*

Dorothy Henzel secured a New York judgement declaring the Reno divorce "null and void". A year later Ms. Lieb secured a judgement adjudicating her marriage to Henzel "null and void" because Henzel's marriage to Dorothy still had legal effect at the time of the Lieb/Henzel nuptials. Ms. Lieb, after losing her new husband, sought recoupment of her lost alimony, $125 per month, in an Illinois federal district court. The trial court granted summary judgement in favor of Mr. Leib reasoning that the Nevada divorce decree was entitled to Full Faith and Credit as a judgement of a sister state and the Court of Appeal affirmed. *Id.*, at 404. In rejecting this reasoning, this Court reasoned that the New York judgement was the last and binding determination of the rights between the parties and had to be given Full Faith and Credit by the lower court. *Id.*, at 408-409.

In this case, there is no question that the coverage issue was before the Pennsylvania Workers' Compensation court. Nor is there any dispute that both parties were present in the Pennsylvania action and that the determination was the last-in-time and it was brought to the New Jersey court's attention through Tarapacki's motion. Because the Pennsylvania judgement was a viable ruling on the merits, New Jersey should have given the Pennsylvania ruling *res judicata* effect under the Full Faith and Credit clause.[12]

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[12] Any argument that New Jersey courts erred in failing to give Full Faith and Credit to Pennsylvania's initial determination on the insurance coverage issue must fail for essentially two reasons: (1) the initial Pennsylvania determination was flawed in a jurisdictional sense in that, as held by the New Jersey courts, the insurance coverage issue was neither litigated nor essential to the matters before the Pennsylvania Workers' Compensation court when the ruling

(b) Because the Pennsylvania Court already had jurisdiction over the coverage issue, which was known to the New Jersey courts, the failure of the New Jersey courts to abstain from ruling on the coverage issue violated the Full Faith and Credit clause of the United States Constitution.

Even apart from the failure of the New Jersey courts to even acknowledge the Pennsylvania judgement, the failure of the New Jersey courts to defer to the Pennsylvania courts on the coverage issue exhibited an appalling lack of comity between sister states. The problem of concurrent and parallel contests, such as the contest in this case, has been a persistent problem which has only gotten worse. R. Ginsburg, *Judgements in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgements*, 82 Harvard L. Rev. 798, 831-32 (1969)(urging this Court to clarify a muddled area of the law).

One example of the confusion caused by the absence of this Court's guidance on Full Faith and Credit jurisprudence has been in the area of interstate enforcement of child custody orders issued by state courts. This Court

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was made, and (2) NJRe never appealed the New Jersey Superior Court, Appellate Division's determination that the initial Pennsylvania coverage determination was entitled to Full Faith and Credit as required by *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 77 (1939).

specifically declined to address the application of Full Faith and Credit to the important area of child custody law on three different occasions. *Halvey v. Halvey*, 330 U.S. 610 (1947); *Kovacs v. Brewer*, 356 U.S. 604 (1957); and *Ford v. Ford*, 371 U.S. 187 (1962). In response to an antecedent epidemic of child kidnapings, Congress passed the Parental Kidnaping Prevention Act of 1980. Pub.L. 96-611, 94 Stat. 3508.(codified 28 U.S.C. Sec. 1738A, *et. seq.*); *But see*, *Thompson v. Thompson*, 484 U.S. 174, 180 (1988)(apparently accepting, without discussion, the premise that because child custody orders are subject to periodic modification in the best interest of the child, they are perpetually interlocutory, hence not subject to Full Faith and Credit analysis).

Legislative intervention by Congress on this issue is problematic in two ways; first, the legislation does nothing to address cases which are not directly related to child custody proceedings, such as adoption proceedings. *See e.g. Matter of Adoption by T.W.C.*, 270 N.J.Super. 225, 636 A.2d 1083 (App. Div. 1994)(without even a mention of the Full Faith and Credit clause, the Appellate Division concludes that even though the State of New York may have concurrent jurisdiction over the proceedings, there is no compulsion for abstention from the case). In addition, Congress is now legislating the area of Full Faith and Credit, where this Court is the final arbiter of such issues and is the proper body to regulate such issues. *Morris v. Jones*, 329 U.S. 545, 552 (1946).[13]

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[13] The logic supporting the proposition that this Court is the proper body to regulate relations between sister state judicial bodies flows from this Court's supervisory role in our federated judicial scheme. In addition, it is clear, from both

The Full Faith and Credit clause itself provides a textual foundation for the proposition that this Court should formulate specific rules of governing comity between sister jurisdictions where there is concurrent jurisdiction between the sister states, including rules governing abstention where appropriate. The Full Faith and Credit clause specifically directs the states to give Full Faith and Credit to the "judicial Proceedings" of sister states, not just the "judgements" or "judicial decrees" of sister states. Support for this conclusion is found in the Journal of the Federal Convention of 1787. According to James Madison's notes, taken during the committee debates on the Full Faith and Credit clause, George Mason, a Virginia delegate to the convention, agreed to language proposed by Governor Morris, based on his understanding that the "effect" of the proposed clause would be restrained to "judgements and Judicial proceedings". W.E. Benton, *1787 Drafting of the U.S. Constitution*, Vol II, p. 1370 (1986). Had the founding fathers wished the Full Faith and Credit clause to be limited to only final judgements, the word "judgement" alone would have been used.

Moreover, as a policy matter, the continued silence of this Court on the issue of concurrent and parallel proceedings in sister states has a danger of leading to an "embarrassing race to judgement" and inconsistent judgements. *See, e.g.*,

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the text of the Full Faith and Credit clause and the legislative history, that the founding fathers intended to limit Congress' role in the Full Faith and Credit area to promulgation of procedural, not substantive, rules. It becomes clear, viewing choice of law jurisprudence, that the law under which you are force to litigate has a significant impact on any substantive rights you may have; hence any rules relevant to forum are more "substantive" than "procedural".

Laker Airways v. Sabena Belgian World Airways, 731 F.2d 909, 928 (D.C.Cir. 1984)(citing cases). In its unique supervisory role, this Court has the power and the obligation to set forth fundamental guidelines that would guide state courts, as a matter of federal compulsion, as to when and how they should exercise their concurrent jurisdiction where there is a parallel proceeding in a sister state. If this Court were to set forth such guidelines, then litigants, such as Tarapacki, would not be forced to litigate their case in multiple forums in order to completely protect their rights and frustrated parents would not be tempted to forum shop when they are dissatisfied with the course of litigation in the forum state.

Conclusion

For the reasons set forth above, Tarapacki prays that this Court grant his request by issuing a writ of certiorari to the New Jersey Superior Court, Appellate Division, and listing this matter for consideration on the merits.

Respectfully Submitted,

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Attorney for Petitioner

Dated: January 14, 1997

APPENDIX

SUPREME COURT OF NEW JERSEY
C-218 September Term 1996
42,555

THADEUS TARAPACKI,
Plaintiff-Petitioner,

v.

DIVERSIFIED CONTRACTING CO.,
Defendant,

v.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY, et al.,
Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6141-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 21st day of October, 1996.

CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6141-94T3

TADEUSZ TARAPACKI,

Plaintiff-Appellant,

v.

DIVERSIFIED CONTRACTING, INC.,

Defendant-Third-Party Plaintiff,

v.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Third-Party Defendant,

and

NEW JERSEY RE-INSURANCE CO.,

Third-Party Defendant-Respondent.

Argued: April 29, 1996 - Decided: June 18, 1996

Before Judges Havey, Conley and Braithwaite.

On appeal from the Superior Court of New Jersey, Law Division, Camden County.

Patrick T. Cronin argued the cause for appellant (Tomar, Simonoff, Adourian & O'Brien, attorneys; Mr. Cronin, of counsel and on the brief).

Moira E. O'Connell argued the cause for respondent (McElroy, Deutsch & Mulvaney, attorneys; Ms. O'Connell, of counsel and on the brief).

PER CURIAM

Plaintiff, Tadeusz Tarapacki, appeals from an order granting summary judgment to defendants New Jersey Manufacturers Insurance Company (NJM) and New Jersey Re-Insurance Company (NJRe) and referring this matter to the Division of Workers' Compensation for a determination of benefits under the New Jersey Workers' Compensation Act. Although NJM was sued, it did not issue the workers' compensation policy at issue and therefore the summary judgment in favor of NJM is not challenged on this appeal. NJRe issued the workers' compensation policy at issue and therefore plaintiff's appeal challenges the summary judgment entered in favor of NJRe. We affirm.

On September 21, 1988, Diversified Contracting, Inc. (Diversified), through its agent Braishfield Associates, Inc. (Braishfield) completed an application for designation of an insurance company pursuant to the New Jersey Workers' Compensation Insurance Plan (the Plan). The Plan designates an insurance company through an assigned risk pool for certain high risk applicants. Line four of the application requested identification of the "location of *all* shops, yards or work places." (emphasis added). Diversified responded, "same as [line two] above." Line two indicated Diversified's post office address as "2 Executive Drive, Moorestown, NJ 08057."

On November 5, 1988, NJRe as designated carrier, issued a workers' compensation policy to Diversified for the period from November 5, 1988 to November 5, 1989. The policy provided coverage under the workers' compensation law of the State of New Jersey. The policy also provided "other states insurance" which included Pennsylvania. The policy set forth how "other states insurance" applied as follows:

> 1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
>
> 2. If you begin work in any one of those states and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in item 3-A. of the Information Page.

> 3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.
>
> B. Notice
>
> Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

On November 17, 1988, NJRe provided Diversified with a questionnaire to verify information on Diversified's application for insurance. Question 3 stated: "List by state all operations outside of N.J." Diversified responded, indicating operations in "Pennsylvania, Delaware, [and] Maryland." Question 3a stated: "For each state listed in 3, provide the name of the insurance carrier providing your Workers' Compensation coverage for each state, and set forth each carrier's policy number and effective date." Diversified responded, "N.J. Re-Insurance Co., [policy number] J76817-6-88, [effective date] 11/5/88 to 11/5/89." Question 4 stated: "Do you have occasion to hire employees outside of the State of N.J. to perform work outside of N.J.?" Diversified responded, "yes."

By letter dated January 20, 1989, NJRe informed Braishfield of an endorsement being issued concerning the policy. The letter said:

> We have recently become aware, via a Questionnaire recently returned by the insured, that this insured has operations in the States of Pennsylvania, Delaware and Maryland. In view of the Fact that it is our intent to insure the obligations of this risk under the New Jersey Workers' Compensation Statute and not to insure the obligations under the laws of any other state, we wish to advise that we will be endorsing our contract effective 12:01 a.m. February 24, 1989 to reflect Item 3C- Other States Insurance as "NONE". It will be necessary for other arrangements to be made for any obligations this employer may have under the laws of any other state.

On January 31, 1989, the endorsement was mailed to Braishfield.

On February 22, 1989, Braishfield, in accordance with Diversified's request, obtained a Certificate of Insurance from NJRe for Beihn Construction, Inc., of Hershey, Pennsylvania. The Certificate covered work including "asbestos removal, replacement, repair and encapsulation" at the Hershey Medical Center. The Certificate covered

> the obligations imposed upon the Insured by the provisions of the Workers' Compensation Law of New Jersey. The limits of liability for Part Two - Employers Liability - under this policy are *unlimited* with respect to employments subject to the New Jersey Compensation Law. For employments not subject to New Jersey Compensation Law, our limits of liability for Part Two - Employers Liability - are as follows Bodily Injury by Accident *$100,000* each accident and for Bodily Injury by Disease *$500,000* policy limit *$100,000* each employee.

The Certificate had stamped on its face the following language:

> THIS POLICY PROVIDES COVERAGE *ONLY* UNDER THE WORKERS' COMPENSATION LAW OF THE STATE OF NEW JERSEY AND *NOT* UNDER THE LAWS OF ANY OTHER STATE. IF YOU MUST HIRE EMPLOYEES OUTSIDE OF NEW JERSEY, COVERAGE FOR THOSE OUT-OF-STATE EMPLOYEES MUST BE SECURED ELSEWHERE.

The Certificate was issued on March 7, 1989.

On March 20, 1989, plaintiff was injured on the job while working for Diversified in Philadelphia, Pennsylvania. On April 13, 1989, plaintiff filed a workers' compensation claim with the Pennsylvania Bureau of Workers' Compensation. On May 8, 1989, Diversified answered plaintiff's petition and admitted that it did not have "insurance in Pennsylvania." By letter dated May 8, 1989, Diversified informed the Pennsylvania Department of Labor & Industry Bureau of Workers' Compensation that it was "returning the Defendant's [sic] answer to the claim Petition and also copies of the claim that was [sic] sent to our Insurance carrier. We do not have any coverage in Pennsylvania. Mr. Tarapacki's attorney submitted the claim incorrectly." On May 10, 1989, NJRe received the

claim forwarded by Diversified under cover dated May 4, 1989. By letter dated May 26, 1989, Diversified informed NJRe that:

> In accordance with your . . . conversation with . . . Braishfield Associates, our insurance broker, on May 25, 1989, please be advised that the accident claim for Mr. Tarapacki should be processed under our above-mentioned workmens [sic] compensation policy no.
>
> This is so even though the employee was injured in Pennsylvania. Employee is subject to New Jersey Workmens [sic] Compensation benefits.

By letter dated June 20, 1989, addressed to Diversified, NJRe advised:

> Pursuant to the workers' compensation policy with the New Jersey Re-Insurance Company, I have directed that workers' compensation benefits be paid to Mr. Tarapacki pursuant to the *New Jersey* Workers' Compensation Act. This will entitle him to temporary compensation at the rate of $342.00 a week commencing March 2, 1989 through May 4, 1989. Additional benefits will be paid pending medical investigation.
>
> With respect to the Claim Petition filed by Mr. Tarapacki seeking workers' compensation benefits pursuant to the Pennsylvania Workers' Compensation Act, be advised that the coverage provided by your policy with New Jersey Re-Insurance Company is limited to claims brought pursuant to New Jersey Workers' Compensation Act. There is no coverage for claims brought pursuant to the workers' compensation of an other State.

On July 14, 1989, the referee of the Pennsylvania Bureau of Workers' Compensation awarded plaintiff workers' compensation benefits. In awarding plaintiff benefits, the referee made a finding that Diversified did not have workers' compensation coverage in Pennsylvania on March 20, 1989. Subsequently, plaintiff reduced his Pennsylvania compensation award to judgment in the Court of Commons Pleas in Philadelphia, Pennsylvania.

On March 9, 1990, plaintiff commenced suit against Diversified to enforce the Philadelphia judgment in the Law

Division, Camden County. On May 7, 1990, final judgment by default was entered against Diversified.

On January 30, 1991, an order was entered vacating the default judgment against Diversified and allowing it to file an answer to the complaint. On February 8, 1991, Diversified filed an answer and third-party complaint against NJM and NJRe. The third-party complaint sought the following relief: (1) an order compelling NJM and NJRe to provide workers' compensation benefits to plaintiff; (2) compensation for all Diversified's costs incurred in defending the action including attorney's fees; and (3) estopping NJM and NJRe from denying coverage. On April 15, 1991, NJM and NJRe filed an answer and counterclaim. In the answer NJM and NJRe admitted issuing the policy to Diversified, and also admitted making temporary disability benefits payments to plaintiff. The counterclaim sought contribution and indemnification. Diversified filed an answer to the counterclaim on May 6, 1991.

Shortly thereafter, NJM and NJRe filed a motion for summary judgment asserting, inter alia, that Diversified's third-party complaint was barred by the doctrine of res judicata because of the determination in the Pennsylvania workers' compensation proceedings. On June 12, 1992, the motion judge, following argument, granted NJM's and NJRe's motion ruling that the Pennsylvania compensation finding that Diversified had no coverage in Pennsylvania was res judicata with respect to the issues before him. On January 12, 1993, plaintiff and Diversified resolved their dispute by the voluntary entry of a judgment in favor of plaintiff in the amount of $140,306.58.

Following the resolution of plaintiff's claims with Diversified, Diversified assigned all of its rights to claims against NJM and NJRe to plaintiff, including its right to appeal the order granting summary judgment. Plaintiff appealed the summary judgment order to this court.

During the time plaintiff's suit was pending in the Law Division, plaintiff appealed the Pennsylvania Compensation Bureau's determination that Diversified had no insurance coverage in Pennsylvania to the Commonwealth Court of Penn-

sylvania. On April 14, 1994, the Commonwealth Court reversed the Bureau's determination, and remanded the matter back to the Bureau for a hearing on the issue of whether Diversified had Pennsylvania insurance coverage on the date of plaintiff's accident.

On July 20, 1994, we reversed the Law Division order granting summary judgment, concluding that res judicata did not defeat plaintiff's claim and remanded the matter for a determination of whether and to what extent NJRe provided coverage for Pennsylvania workers' compensation claims. We suggested that the remand hearing be delayed pending the outcome of the hearing in the Pennsylvania Bureau of Compensation on the issue of coverage. On August 1, 1994, NJRe moved for reconsideration and clarification of our ruling. We denied the motion.

Subsequently, NJRe filed a new motion for summary judgment. On May 24, 1995, Judge Little granted NJRe's motion for summary judgment finding that the Pennsylvania coverage had been removed from the policy by endorsement prior to plaintiff's accident in Pennsylvania. He further concluded that plaintiff was entitled only to benefits pursuant to the New Jersey statute. Judge Little referred the case to the Division of Workers' Compensation for a hearing to determine plaintiff's benefits under New Jersey law.

On June 8, 1995, plaintiff filed a motion for leave to appeal with this court. On July 12, 1995, we determined that plaintiff's motion was a notice of appeal from a final judgment and accepted the parties' motion briefs as merits briefs with leave to file supplemental briefs.

On this appeal, plaintiff contends:

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF NEW JERSEY REINSURANCE, BECAUSE MATERIAL ISSUES OF FACT EXISTED ON THE ISSUE OF COVERAGE.

(a) Because New Jersey failed to comply with *N.J.S.A.* 34:15-81 in canceling the Other States Coverage, the endorsement remained in effect at

the time of the accident, and therefore New Jersey is liable for any judgment awarded by the Pennsylvania Division of Workmen's [sic] Compensation.

(b) Because Pennsylvania law, articulated in 40 P.S.A. § 813, prohibits the cancellation of workmen's [sic] compensation coverage during the policy effective period, absent a failure to pay stated premiums, any purported endorsement by New Jersey attempting to terminate coverage is to void as a matter of law.

(c) Because New Jersey failed to mail the purported endorsement to the Insured, as required by the contract and the Plan, the Other States endorsement remained in effect as the time of the accident, and therefore New Jersey is liable for any judgment awarded by the Pennsylvania Division of Workmen's [sic] compensation.

(d) Because endorsement number 4, was not the product of mutual agreement and was not supported by consideration, the endorsement was invalid, therefore the Other States endorsement remained in effect at the time of the accident, and therefore New Jersey is liable for judgment awarded by the Pennsylvania Division of Workmen's [sic] Compensation.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT NEW JERSEY WORKER'S (SIC] COMPENSATION LAW CONTROLLED IN THIS CASE.

We have carefully reviewed the record and, in light of applicable law, we conclude that plaintiff's contentions in Points I (b), (d) and II are clearly without merit. *R.* 2:11-3 (1)(e)(E). We address the arguments raised in Points I (a) and

As to Point I (a), *N.J.S.A.* 34:15-81 provides as follows:

Any contract of insurance issued by a stock company or mutual association against *liability arising under this*

> *chapter* may be canceled by either the employer or the insurance carrier within the time limited by such contact for its expiration.
>
> No such policy shall be deemed to be canceled until:
>
> (a) At least ten days notice in writing of the election to terminate such contract is given by registered mail by the party seeking cancellation thereof to the other party thereto; and,
>
> (b) Until like notice shall be filed in the office of the commissioner of banking and insurance, together with a certified statement that the notice provided for by paragraph "a" of this section has been given; and,
>
> (c) Until ten days have elapsed after the filing requirement by paragraph "b" of this section has been made.
>
> The provisions "b" and "c" of this section shall not apply where the employer has replaced the contract to be canceled by other insurance, and notice of such replacement has been filed with the Commissioner of Banking and Insurance. In such event the notice required by provision "a" may, if given by the insurance carrier, recite as the termination date the effective date of the other insurance, and the contract shall be terminated retroactively as of that date. No notice of cancellation of any such contract need be filed in the office of the Commissioner of Banking and Insurance where the employer is not required by any law of this State to effect such insurance.
>
> [(Emphasis added).]

We are satisfied by the statute's plain language that it only applies to the cancellation of a workers' compensation policy arising under the Workers' Compensation Act of the State of New Jersey. The statute's reference to "liability arising under this chapter" makes this very clear. Here, NJRe did not cancel Diversified's New Jersey coverage under the policy.

Finally, as to Point I (c), we are satisfied that the cancellation provisions of the policy do not afford plaintiff relief. The cancellation provisions under the policy provide as follows:

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancellation notice.
4. Any of these provisions that conflicts with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with that law.

We conclude that the language of the policy applies to the act of canceling the entire policy, not to an endorsement modifying the terms of the policy. Moreover, cancellation and endorsement have different meanings. "Cancellation of a workers' compensation insurance policy . . . mean[s] to annul or destroy, to revoke or recall the policy." Appleman, *Insurance Law & Practice,* Vol. 8B § 5041 (1981). We are satisfied that this language envisions the termination of the entire insurance contract. Cancellation acts "as though the contract had never been made." *Id.* §5047. In contrast, an endorsement must be read together with a policy, "and the policy remains in full force and effect except as altered by the words of the endorsement; conversely the endorsement modifies, to [the] extent of the endorsement, the terms and conditions of the original insurance contract." *Id.* The endorsement here modified and clarified that NJRe only provided workers' compensation coverage under the Workers' Compensation Law of the State of New Jersey.

Furthermore, we conclude that although actual written notice of the endorsement deleting out-of-state coverage was not sent to Diversified, Diversified knew prior to plaintiff's accident that it did not have workers' compensation coverage in Pennsylvania. Diversified sought and obtained Certificates of Insurance from NJRe for jobs in Pennsylvania prior to plaintiff's accident which clearly show that NJRe provided coverage only under the workers' compensation law of the

State of New Jersey. On the face of the Certificate of Insurance that NJRe issued on behalf of Diversified for a job in Hershey, Pennsylvania, dated March 7, 1989, prior to plaintiff's accident, is the following language:

> This policy provides coverage *only* under the Workers' Compensation law of the State of New Jersey and not under the laws of any other state. If you must hire employees outside of New Jersey, coverage for those out-of-state employees must be secured elsewhere.

Affirmed.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3055-92T3

TADEUSZ TARAPACKI,
Plaintiff-Appellant,

v.

DIVERSIFIED CONTRACTING, INC.,
Defendant-Appellant,

v.

. NEW JERSEY MANUFACTURERS
INSURANCE COMPANY and
NEW JERSEY REINSURANCE COMPANY,
Defendants-Respondents.

Argued May 23, 1994 – Decided July 20 1994

Before Judges Muir, Jr. and Thomas.

On appeal from the Superior Court of New Jersey, Law Division, Camden County.

Mark Belland argued the cause for appellant Tadeusz Tarapacki (Tomar, Simonoff, Adourian & O'Brien, attorneys; Patrick T. Cronin, of counsel and on the brief and reply brief.)

Moira E. O'Connell argued the cause for respondents New Jersey Manufacturers Insurance Company and New Jersey Reinsurance Company (McElroy, Deutsch & Mulvaney, attorneys; Ms. O'Connell of counsel and on the brief.)

No brief was filed on behalf of defendant Diversified Contracting, Inc.

PER CURIAM

Plaintiff appeals from a summary judgment order entered in favor of New Jersey Manufacturers Insurance Company and New Jersey Reinsurance Co. (New Jersey) which denied workers' compensation coverage for plaintiff, an employee injured in a work-related accident in Pennsylvania.

The issue arose after plaintiff obtained a workers' compensation award in Pennsylvania against his employer, Diversified Contracting, Inc. (Diversified). The award was reduced to judgment in Pennsylvania, and then suit was brought on that foreign judgment in New Jersey. Diversified answered the full faith and credit action and brought a third-party complaint against New Jersey, seeking indemnification for its (the employer's) liability. The suit on the foreign judgment resulted in the entry of a judgment here against Diversified for $140,306.88. New Jersey had previously refused to defend against the workers' compensation proceeding in Pennsylvania and disclaimed liability for the Pennsylvania award. These refusals were premised upon a provision in Diversified's policy which purported to exclude coverage for its workers' compensation liability in any state other than New Jersey.

The trial judge granted New Jersey's motion for summary judgment on the principle of *res judicata* (because the Pennsylvania workers' compensation bureau had previously determined that plaintiff was "uninsured" in that state) and on the trial judge's independent reading of the insurance policy.

> The [Pa.] decision (that Diversified was not insured] is, I believe, res judicata and should be given full faith and credit.
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>
> Admittedly, in reviewing the policy itself, the policy does not provide for coverage for claims made in Pennsylvania.
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> • • • •
>
> For those two reasons, the motion for summary judgment by third party defendant is granted.

Only plaintiff has appealed from the grant of summary judgment in favor of New Jersey.

Preliminarily New Jersey contends that Diversified was the only aggrieved party below and since it failed to appeal, this appeal should be dismissed. Plaintiff responds that he is presently before this court based on an assignment of rights granted to him by Diversified. We find that plaintiff is a sufficiently aggrieved party to prosecute this appeal because of the assignment of rights and because of rights granted to him under our own workers' compensation statutory scheme. *See N.J.S.A.* 34:15-87.

We also reject plaintiff's argument that the lower court lacked jurisdiction because of the supposed exclusive jurisdiction of the New Jersey Division of Workers' Compensation to hear the coverage issue. See *Goldmann v. Johanna Farms, Inc.*, 26 *N.J. Super.* 550, 554-55 (Cty. Ct. 1953), wherein the Court held that a question of insurance coverage is a legal issue not cognizable by the Workers' Compensation Court, and *Aetna Life & Cas. v. Estate of Engard,* 218 *N.J. Super.* 239, 245 (Law Div. 1986), where the Law Division was held to be an appropriate forum to decide issues secondary and derivative from a claim for workers' compensation benefits. But see *Ansede v. National Gypsum Co.*, 73 *N.J.* 444, 448 (1977), where the Court held the Workers' Compensation Division has jurisdiction to decide claims between or among insurance carriers, and *Aetna Cas. & Sur. Co. v. Para Mfg. Co.,* 176 *N.J. Super.* 532, 537 (App. Div. 1980), where we held a P.I.P. carrier can seek, in a workers' compensation proceeding, enforcement of its statutory right to deduct collectible workers' compensation benefits from P.I.P. benefits.

Plaintiff primarily argues that fact issues exist on the question of Diversified's workers' compensation (coverage which should bar the entry of summary judgment. The question of coverage was never decided on the merits by the trial judge because he ruled that the principle of *res judicata* had resolved that issue. Initially, we note that the Pennsylvania Referee's coverage decision is on appeal and thus is not a final judgment. For that reason alone, the decision of the trial court must be reversed.

The principle of *res judicata*/collateral estoppel was explained in *Plainfield v. Public Service Elec. and Gas Co.*, 82 *N.J.* 245 (1980):

> A further argument made by the municipality is that the issues in controversy cannot be adjudicated because they are barred under the doctrine of *res judicata.* It is asserted that since the earlier decision of the Court of Errors and Appeals in *Public Service Electric, supra,* involved the same parties and the identical contractual obligation at issue here, it serves to preclude this subsequent litigation.
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> The general rule regarding "issue preclusion" arising out of prior judgments was expressed by this Court in *Washington Tp. v. Gould,* 39 *N.J.* 527, 533 (1963), as follows:
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> > "It is well-settled that where a judgment of a court of competent jurisdiction directly determines a right, question or fact distinctly put in issue, such judgment estops the parties or their privies from thereafter relitigating the same issue in a subsequent proceeding between them, regardless of its nature or form."

In *State v. Gonzalez,* 75 *N.J.* 181, 186 (1977), it was stated that "[c]ollateral estoppel is that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *See United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co.* , 74 *N.J.* 92, 101 (1977); *State v. Ingenito,* 169 *N.J. Super.* 524, 531 (App. Div. 1979); *Gareeb v Weinstein,* 161 *N.J. Super.* 1, 15 (App. Div. 1978). The general rule was formulated in the *Restatement (Second) of Judgments* § 68 at 1 (Tent. Draft No. 4, 1977) as follows:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the

> determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."
>
> *See generally* Currie, *"Res judicata:* The Neglected Defense," 45 *U. Chi. L. Rev.* 317 (1978); Note, *"Res judicata*: Cause v. Common Law," 22 *Loyola R. Rev.* 221 (1976).
>
> [*Id.* at 257-58.]

We also take cognizance of the manner and circumstance surrounding the Pennsylvania coverage decision. The existence of coverage was not essential to the Pennsylvania court's judgment. It also was never distinctly put in issue nor litigated because Diversified was not represented. Rather, the coverage decision was made solely on the admission of an affidavit from the Pennsylvania Compensation Rating Bureau, which said nothing more than that a search of their files failed to disclose that Diversified "was carrying Workers Compensation insurance March 20, 1989." This we know to be untrue because admittedly, Diversified did not have workers' compensation insurance.

More importantly, the issue was not *if* Diversified had workers' compensation insurance — it did — but whether Diversified's insurance extended to plaintiff under the existing circumstances. New Jersey admits plaintiff's claim would have been covered if made in New Jersey. Further, plaintiff could have brought his petition in New Jersey, because the contract of hiring was here and defendant was a New Jersey company with offices in New Jersey. *Gotkin v. Weinberg,* 2 *N.J.* 305, 307-08 (1949) (if contract of employment is made in New Jersey, it is immaterial whether accident occurred here or not because statute enters by operation of law into every contract of hiring made here); *Phillips v. Oneida Motor Freight, Inc.,* 163 *N.J. Super.* 297, 301 (App. Div. 1978) (New Jersey would accept jurisdiction regardless of residence of employee, situs of employment relationship or location of accident, as long as other significant contacts exist here). *See generally Restatement (Second) of Conflicts of Law* § § 181-82 (1971).

Thus, the real issue, which has never been litigated is: did Diversified's policy cover it for Pennsylvania accidents? We phrase the issue in such fashion notwithstanding the contract language proporting to exclude coverage for any but New Jersey accidents. We do this because of fact issues raised by plaintiff in his summary judgment affidavits as to the events surrounding the acquisition of the policy and on the advice we gave in *Toebe v. Employers Mut. of Wausau,* 114 *N.J. Super.* 39 (App. Div. 1971), *rev'd on other grounds,* 63 *N.J.* 198 (1973).

In that case, a work-related injury occurred in New Jersey, but the employer's insurance company refused to defend the New Jersey claim petition contending it had no obligation under the terms of its policy, since the policy provided that workers' compensation coverage would be determined by the law of Minnesota where the employer was located. 114 *N.J. Super.* at 41-43. The employee recovered an award in New Jersey which his employer refused to pay. The employee then brought an action in the Law Division against the employer's insurance carrier. *Id.* at 41-42. In that action, the insurance company conceded that the New Jersey Division of Workers' Compensation had jurisdiction to enter the award against the employer. The only issue left was whether the insurance company was liable to pay the award in light of the provision in its policy limiting workers' compensation benefits to those payable under Minnesota law. *Id.* at 43.

In our *Toebe* discussion, we recognized that there was a line of cases, including one from our own jurisdiction, *Pennsylvania Mfrs. Cas. Ins. Co. v. Schmerbeck,* 128 *N.J.L.* 180, 181-84 (Sup. Ct. 1942), *aff'd o.b.,* 131 *N.J.L.* 159 (E. & A. 1944), which held that the rights created by one state's compensation statute could not be enforced in another state. *Toebe v. Employers Mutual, supra,* 114 *N.J. Super.* at 46. We noted these cases had accepted the proposition that where a policy covers liability exclusively under the workers' compensation law of one state, the insurer could not be held liable in proceedings instituted in the compensation bureau of another state. *Id.* at 47. Nevertheless, we felt an alternative solution existed: namely, permitting an injured employee to sue his

employer's insurance carrier, otherwise the policies underlying the workers' compensation law of our state would be frustrated. *Ibid.*

Thus, we found an equitable result by applying conflicts of law principles. That is to say, an insurance company can be held responsible for all amounts of the forum state's award — to the extent the award would have been granted under the workers' compensation law of the state named in the insurance policy. *Id.* at 48-49. This solution does not change the terms of the insurance policy nor the premium base. *Id.* at 49. Accordingly, in *Toebe* we remanded to the Division of Workers' Compensation with instructions to apply the Minnesota statute in fashioning an award which would reflect what the plaintiff would have recovered in Minnesota. Additional testimony was permitted if needed. *Id.* at 52. We also specifically rejected the proposal that the parties go to Minnesota and proceed there, and found no problem in this State's applying the law of another state. 114 *N.J. Super.* at 50-53. Support for this approach was found in the cases of *Weinberg v. State Workmens' Ins. Fund,* 81 *A.*2d 906 (Pa. 1951), and *Kacur v. Employers Mut. Cas. Co.,* 254 *A.*2d 156 (Md. Ct. App. 1969).

Other cases have followed the *Toebe/Weinberg/Kacur* approach: *Smith & Chambers Salvage v. Insurance Management Corp.,* 808 *F. Supp.* 1492, 1502 (E.D. Wash. 1992 (workers' compensation proceeding brought in Oklahoma arising out of Texas accident; insurance policy covered only Texas workers' compensation laws; court followed above approach and held to interpret the contract so as to make coverage dependent on the employee's choice of forum would be absurd); *American Mut. Ins. Co. v. Duvall,* 372 *A.*2d 263, 264-66 (N.H. 1977) (employee injured and filed for benefits in New Hampshire, but insurance was limited to coverage "afforded under the workers' compensation law of Massachusetts"; court followed the above approach and held the fact the employee chose to file in New Hampshire was a "happenstance" which was irrelevant to the question of the insurer's liability under the policy). *See also* 4 Arthur Larson, *Workmen's Compensation Law* § 93.41 at 17-87 to 17-88 (1993) (acknowledging this approach, and noting that the over-riding

public interest in seeing that employees receive the insurance protection intended by statute "results in some policy interpretations which could hardly happen under any other form of insurance").

Accordingly, we reverse and remand for a full determination on the merits of the coverage issue with the suggestion that the remand hearing be delayed until the pending Pennsylvania appeal has been resolved.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAMDEN COUNTY
DOCKET NO. CAM-L-02362-90
A.D.#_____

TRANSCRIPT OF MOTION FOR
SUMMARY JUDGMENT

TADEUSZ TARAPACKI,

Plaintiff

vs.

DIVERSIFIED CONTRACTING, INCORPORATED,

Defendant

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY and
NEW JERSEY REINSURANCE COMPANY,

Third-Party Defendants

Place: Camden County Court House
101 South 5th Street
Camden, NJ 08103

Date: May 24, 1995
BEFORE:

HON. CHARLES A. LITTLE, J.S.C.

TRANSCRIPT ORDERED BY:

PATRICK T. CRONIN, ESQ., (Tomar, Simonoff, Adourian & O'Brien)

APPEARANCES:

PATRICK T. CRONIN, ESQ., (Tomar, Simonoff, Adourian & O'Brien), Attorney for the Plaintiff

MOIRA E. O'CONNELL, ESQ., (McElroy, Deutsch & Mulvaney) Attorney for the Third-Party Defendants

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rect is outrageous. It is belied by the very certification that he submitted his supplement papers. We know that as of September 21, 1988, Diversified Contracting had extensive Pennsylvania operations. Mr. Sanders has said that he told his agent that he needed Pennsylvania coverage because he had Pennsylvania operations. So, I think Mr. Cronin should be very careful before he speaks.

MR. CRONIN: Your Honor, I just merely point out that there are fact questions here. They have the —

MS. O'CONNELL: That's not a fact question, Judge.

MR. CRONIN: Well, — Your Honor, I'm not going to get into a mud slinging contest. The bottom line is, they are fact questions. As I said, for the four reasons, I suggest that the cancellation was ineffective, and we're getting deeper and deeper into fact questions. I don't know the answer to that. I don't know the answer to any of the fact questions that have been raised.

THE COURT: All right. I have your arguments from the previous what, two Fridays ago? When did we —

COURT CLERK: The 12th.

THE COURT: The 12th of May. I've heard your arguments today. I reviewed your documents prior to the other motion, and as I've told counsel last night, I took them home and I reviewed them again last night. I also have before me the Appellate Division decision under their Docket number A-

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3055-902T3 where it was Judge Muir and Judge Thomas who heard the appeal. That appeal was taken from Judge Fratto who is my sweetmate, and I also — I spoke with Judge Fratto about the matters to get his recollection of what he recalled.

When the matter was previously before Judge Fratto, it was there on the issue of res judicata; the basis being that the Pennsylvania Courts had determined that there was no insurance coverage in Pennsylvania and, therefore, Judge Fratto, with that understanding, granted the motion on its full faith and credit to be a decision honoring the Pennsylvania decision

finding there was no coverage and granted the motion for summary judgment. Of course, the appeal was taken, and my understanding in reading the papers – from reading the papers submitted is that Diversified Contracting, Incorporated, the defendant in this matter, has taken – or Mr. Tarapacki has taken an assignment of Diversified Contracting, Incorporated's rights under the policy in this case and, therefore, the action really is between Tarapacki, assignee of the rights of Diversified Contracting, versus New Jersey Reinsurance. An appeal was taken. The Appellate Division heard it, and, as Judge Fratto advised me, at the time he granted the motion for summary judgment stating res judicata, he was not aware that there was an appeal pending in Pennsylvania. I don't know if that appeal was before that motion or after that motion. But, anyway, the Appellate Division was aware of the appeal and because of the

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status of the appeal, they said it was not at final judgment; therefore, res judicata would not apply and the Court could rule on the matter. Well, they remanded it to the trial court. A quote from page nine of that opinion, "Accordingly, we reverse and remand for a full determination on the merits of the coverage issue with a suggestion that the remand hearing be delayed until the pending Pennsylvania appeal has been resolved."

My understanding from I believe it was in Mr. Cronin's brief; also I gathered from speaking on the phone yesterday I think with both counsel, that the matter originally was to be heard Friday. That would be May 26th, is that right?

MR. CRONIN: May 25th, Your Honor, I believe.

THE COURT: May 25th was to be heard by the Pennsylvania Workers' Comp court or –

MR. CRONIN: Right.

THE COURT: – Common Pleas court – a court over there was going to hear it and make a determination –

MR. CRONIN: on the other side of the river, Your Honor.

THE COURT: — on the other side was going to hear it and make a determination one way or the other, and now I have been advised that that has been adjourned without date. So, that is still pending. I also understand in this case that the petitioner, plaintiff/petitioner — we were in copies of peti-

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tioner, but we're in civil so he's a plaintiff — has not received any money from the date of the accident till today.

MS. O'CONNELL: Your Honor, if I may correct —

MR. CRONIN: That would not be accurate, Your Honor. I'm sorry.

THE COURT: That's not accurate?

MS. O'CONNELL: NJ Re did pay temporary benefits to him. We paid — and I think we began paying them in July retroactive to March, continued payment of temporary benefits through October, but those benefits were terminated when he twice failed to appear for an examination. There was also a significant amount of medical benefits paid on his behalf, but I can't — I think in the $14,000 range, something like that.

MR. CRONIN: Just so Your Honor understands the basis for the nonappearance, under — as I understand it and I'm not — as I said, I do maybe license over in Pennsylvania, but I often only go visit South Street when I'm over there; I don't visit courtrooms. My understanding under Pennsylvania Workers' Comp law, that if an insurance carrier denies coverage, there's no right to a medical exam, and he basically did not appear based on advise of counsel. I just wanted the Court to understand he just didn't do it because he didn't feel like it or missed the bus.

THE COURT: I have no knowledge of Pennsylvania Workers' Compensation law other than what I read in the newspa-

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pers and hear on radio and TV, et cetera. So, I'm ignorant of Pennsylvania Comp law.

MS. O'CONNELL: As am I, Your Honor. I just want to point out one other thing. With respect to the portion of the Appellate Division opinion that you read where they recommended that we await the outcome of the pending appeal, –

THE COURT: Yes.

MS. O'CONNELL: – all pending appeals have been resolved. There are no appeals pending. The matter's been remanded to the Bureau, but what the Appellate Division was talking about was appeals, and there are no appeals pending.

MR. CRONIN: I think that calls for speculation. I think what they're – and only briefly to put my thoughts on that, Your Honor. Frankly, they said, look, wait till they actually resolve the issue over there one way or another, and then –

MS. O'CONNELL: That's not what they said, Your Honor.

MR. CRONIN: I mean, if it's a res judicata case, let's do it that way.

THE COURT: That's what I gathered, –

MR. CRONIN: Right.

THE COURT: – and I don't know what the status is. I don't know if the hearing is in the Common Pleas or if it's in Workers' Comp over there.

MR. CRONIN: I believe it's in Worker's – it's been

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remanded with – I'm not sure if they retain – how they do it, but they send it down for the hearing.

THE COURT: But, anyway, the matter is here for this Court to decide. And based upon counsel that there being no appeals, it's been remanded to the Division of Workers' Compensation in Pennsylvania, I feel that we have jurisdiction and by my deciding this matter, I would not be going against the suggestion of our Appellate Division.

I think the facts of the case are clear that back in September 21st of 1988, an application was made to the Compensation Rating and Inspection Bureau of the state of New Jersey at 60 Park Place for – well, the caption of the application is Application for Designation of an Insurance Company in accordance with a New Jersey Workers' Compensation Insur-

ance Plan. That application is dated September the 21st of 1988. The plan assigned this matter to, I guess it's New Jersey Manufacturers and New Jersey Re — just New Jersey Re.

MS. O'CONNELL: Just New Jersey Re.

THE COURT: The applicant in that case was Diversified Contracting Company, Incorporated. The address as given in the application is 2 Executive Drive, Moorestown, New Jersey. It is a corporation. It sets forth the businesses that the insured would be involved in; that being, asbestos abatement, payroll, contractor and drivers and clerical, and then it gives the premium of $31,188, and then it gives the names of the

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incorporators; that being, Dorothy Sanders and James Walls (phonetic) or the ownership of the corporation. I don't know if they're the incorporators or not. And the policy previous Workers' Compensation insurance in the last three years — "Have you had a policy of Workers' Compensation insurance in effect during the last three years?" The answer is, "No." The date that the insurance was required by was October the 15th of 1988. They have no claims for unpaid comp premiums, and they have the standard rest. The designated license producer, if any, was Braishfield Associates, Incorporated, of Pennsylvania, and it gives their federal identification number and their address, and that is signed by — I don't know who; I can't read it, but I can read the date. It's September the 21st of 1988.

Pursuant to that application that was assigned to New Jersey Reinsurance Company, that assignment, if I'm reading the form right here, a copy of this notice also sent to the employer and producer if any. It was sent to New Jersey Reinsurance with their address; the employer being Diversified, the designated producer being Braishfield. And in that form it states to the designated insurance company, "Employer named above has made application for the designation of an insurance company under the New Jersey Workers' Compensation Insurance Plan. The above designated insurance company is herewith furnished with a copy of the application for use in determining the proper

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premium basis. No premium payment accompanied the application; thus, there is no insurance in effect. Insurance will be effective 12:01 a.m. the day following receipt of the prescribed advanced premium."

New Jersey Re then notifies Mr. David Kressler of Braishfield Associates of Pennsylvania that the Compensation Rating and Inspection Bureau has instructed us; "us" being New Jersey Reinsurance Company, to issue a New Jersey Workers' Compensation insurance policy to the above employer under the provisions of the New Jersey Workers' Compensation Insurance Plan. In order to comply with the Bureau's instructions, it will be necessary that we be provided with a check in the amount of $30,055.79 which represents the full established annual premium of 31,208 less a fee of $1,152.21. And then it goes on to say, they can make their payments in installments stating that it is — they can be done, but they are not in the practice of financing premium arrangements. That goes to Barbara Doyle of Braishfield Associates, Incorporated.

There is then a check in the amount of $30,055.79 payable to New Jersey Reinsurance issued on the account of Braishfield Associates, Incorporated. Their address on the check being Premium Account, 100 Wall Street, New York, New York. I assume once that check was received, a policy was issued; that being the bone of contention in this case because, well, if we look at the date of the check, the check was issued

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on November the 4th of 1988. The policy of insurance is then issued on November the 17th of 1988 wherein the named insured, of course, is Diversified Contracting, their address, and the policy period is from November the 5th of '88 to November the 5th of 1989. And in that dec sheet or face sheet — oh, it goes on to state in section three — 3A, Workers' Compensation insurance par one of the policy applies to the

Workers' Compensation law of the states listed here: NEW JERSEY. B, Employer's liability part two of the policy applies to work in each state listed in item 3A. The limits of our liability under part two are bodily injury, 100,000 each accident; bodily injury by disease, 500,000; bodily injury by disease each employee, 100,000. other states' insurance part three of the policy applies to the states, if any, listed here, and this is why we're here. It states after here, "All states except Nevada, North Dakota, Ohio, Washington, West Virginia, Wyoming, Texas," and I also note New Jersey. I don't know that I picked that up, but if you look at the dec sheet, except New Jersey. I underlined New Jersey. I don't know why that's there.

MR. CRONIN: Your Honor, if I may, and I understand Your Honor's ruling, but I think that is because it would be redundant. If you read part three, what it does is it writes in — if they start working in any one of those states, all states except those states, then it writes it in under part A. So, you'd be writing it in twice.

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THE COURT: Redundancy. And then it says, "This policy includes these endorsements and schedules, 00 03 16 and then WC29 03 01 and then WC29 04 06C. The premium for this policy will be determined by our manual of rules, classification, rates and rating plans. All information required is subject to verification and change by audit," and then it gives the various charges coming up to a total premium of 31, and, again, producers Braishfield Associates, Inc. of Pennsylvania.

And then it goes on to the endorsements that are attached thereto. I think the main one that we're limited — or interested in is the endorsement WC29 03 01 where it states, "New Jersey Reinsurance Company of New Jersey part two limit of liability endorsement. This endorsement applies only to the insurance provided by part two (employer's liability insurance) because New Jersey is shown in item 3A of the information page." That's where it goes back up to the list of additional insureds. It says, "We may not limit our liability to

pay damages for which we become legally liable to pay because of bodily injury to your employees. If the bodily injury arises out of and in the course of employment, that is subject to and is compensable under the Workers' Compensation law of New Jersey," and it goes on to the effective date, premium, discount, and endorsement.

The next endorsement we have is the one which creates the problem here which is WC99 04 03. "Policy information page

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endorsement, item 3C: None." That, of course, if we go back to the original is the other states' insurance, and that is the endorsement which changes 3C from all states except those listed and it puts none. That endorsement was issued effective February the 24th of 1989.

So then we have to go back to the application. The application was made; however, the question there — and the premium was paid in November of 1988. The information sheet, I guess that's what you would call it, which is a New Jersey Reinsurance Company application, the insured is Diversified Re: New Jersey Workers' Compensation insurance policy numbers J76817-6-88, effective date November the 5th of 1988. The questionnaire was received by New Jersey Reinsurance Company in January of 1989. And in that application it says, "Indicate any change in name," et cetera; there is no change. "List all locations from which you conduct your operations, 2 Executive Drive, Moorestown, New Jersey." And then it says, "List by state all operations outside of New Jersey," and there is listed Pennsylvania, Delaware, and Maryland. "For each state listed in three, provide the name of the insurance carrier providing your Workers' Compensation coverage for each state, set forth each carrier's policy number and effective date." They then list the New Jersey Reinsurance Company with a policy date as set forth above November 5 to November 5 of — '88 to '89.

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Then you have your other questions, "Did you have occasion to hire employees outside of New Jersey? Yes. Have you used subcontractors? Yes. Are you presently using subs? Yes." And then it says "See Rider attached," and it gives the list of the subs used. And then it says, "Provide the following current anticipated annual payroll information," and that's listed as $600,000. Then you have your officers named. "Name and title of individual who has book and records," and that's Sam Sanders from Executive Drive in Moorestown and it gives his phone number. That application is received, if I'm reading this stamp right, January the 3rd of 1989.

On January the 20th of 1989, there's a letter directed by Esther Constance, Underwriter of New Jersey Reinsurance Company, addressed to Braishfield Associates of Pennsylvania. And in that letter it states, "We have recently become aware via a questionnaire recently returned by the insured that this insured has operations in the states of Pennsylvania, Delaware, and Maryland. In view of the fact that it is our intent to insure the obligations of this risk under the New Jersey Workers' Compensation statute and not to insure the obligations under the laws of any other state, we wish to advise that we will be endorsing our contract effective 12:01 a.m., February the 24th, 1989 to reflect item 3C, other states' insurance as "none." It will be necessary for other arrangements to be made for any obligations this employer may have under the laws of

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any other state. Our endorsement will follow under separate cover."

We then come to January the 31st — well, it's stamped January the 31st of 1989, and notice going out to Braishfield Associates of Pennsylvania, Re: Diversified Contracting Workers' Compensation policy in accordance with information submitted on our questionnaire, we enclose endorsement number four for attachment to the caption policy. That endorsement, of course, is the changing of other states to none.

So, we have Braishfield. I know plaintiff's counsel has argued that the law calls for notice to the insured; however, my notes, I have notice of cancellation of other states was sent to insurance broker who, and I think under the broker's laws of the state of New Jersey anyway, a broker is the agent of the insured and, therefore, my question was, isn't notice to the agent notice to the principal or plaintiff in this case? Plaintiff selected the agent, and I think we would apply the law of the state of New Jersey. I know that plaintiff's position is that the law of Pennsylvania should apply because the accident happened in Pennsylvania, the policy of insurance — the application for the policy of insurance was sent from Pennsylvania; that Pennsylvania is a brokerage from Pennsylvania. However, as I stated on the other motion day, the laws of New Jersey would be applied in this case, and my reason for saying that is quite clear I think, and that is that

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the insured was a New Jersey corporation, the insurance policy was written by a New Jersey insurance company. The policy is clear that it states that it is for Worker's — it will be governed by the New Jersey Workers' Compensation laws; therefore, if we go by the law, it's not even the center of gravity test that is usually applied, or the majority of contacts or the proper — I can't think of it right now. What's the word I'm thinking of, the phrase of contacts?

MR. CRONIN: Significant contacts.

THE COURT: Significant contacts. Thank you, Counsel. Significant contacts. I think New Jersey again on the significant contacts is the major state. I realize that plaintiff is a Pennsylvania resident. There is a dispute as to where he was hired. I think counsel for plaintiff states he was hired in Pennsylvania.

MR. CRONIN: That's my understanding it was, Your Honor.

THE COURT: The Appellate Division — if you read the Appellate Division case, they say he was hired in New Jersey.

I don't know where they — the App. Div. says contact of hiring was New Jersey, and I don't where the Appellate Division got that.

MR. CRONIN: No clue.

THE COURT: Since it is the Appellate Division, they're above me, I'll take their word for it, and I don't know

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if there are other offices of Diversified located in other states or how their hiring practice is, but since their main office in this scenario has been listed as 2 Executive Place, Moorestown, New Jersey, I will assume for the purposes of this case that he was hired in New Jersey. I also understand, having done Workers' Compensation cases as well as civil cases for 20 some years, I understand and know that when a worker is injured, he has two places where he can — if he's hurt in one state and hired in another state, he can look around and say, hey, which state is best for me, and file a cause of action or he can file a Workers' Compensation petition in that state. So, he can either go where he was hired, or he can go where he was hurt and file his petition for Workers' Compensation. I think that's basic law.

In this case I think it is clear that — oh, well, the plaintiff or the — yeah, that's the plaintiff here. Oh, I looked around and said, hey, what state is best for me? And anybody who knows Workers' Compensation law, and this immediate area being border to Pennsylvania knows that Pennsylvania has much, much better for injured employees than New Jersey when it comes to temporary disability benefits. They're not better in permanent disability unless the law has changed in the last nine years because when I did practice in comp, I always noticed that petitioners would file over there to get their temporary disability benefits, but then when the temp was about

The Court - Decision **[31]**

to expire, whatever happens over there, their petitions for permanent disability would always be filed in New Jersey. I don't know if that's still the same or not, but he has that choice of laws or choice of forums to file for Workers' Compensation.

But I think under the facts of this case, the New Jersey law is applicable in deciding this case and in interpreting the contracts.

So, we're back to the scenario of — well, that was as far as a broker is concerned, and I so find that Braishfield was the agent of Diversified and notice was given to Diversified back on January 20th of 1989. That the endorsement would come out giving no — other states' insurance would be none based upon the application being received January the 3rd showing that they did conduct a lot of business outside of the state of New Jersey, and at that time advising the broker that the insurance coverage or arrangements would have to be made to cover the employees in those other states. Evidently, the insurance broker did nothing in this case, and then we come along to — the accident happened in March of '89. But also I looked at the — there was a Certificate of Insurance. I don't know who filed it or what, but there is a Certificate of Insurance dated February the 22nd of 1989, and it was given to Beam Construction, Incorporation, P.O. Box 460, Hershey, Pennsylvania, attention of Karen Spencer. And in that Certificate of Insurance, it has the producer Braishfield Associates,

The Court - Decision **[32]**

Inc. appears at Penns Landing, Philadelphia, the insured is Diversified, and the companies listed for affording coverage were United Capital Insurance Company, GRE Albany Atlas Group, and New Jersey Reinsurance Company.

The certificate of insurance supplied by New Jersey Reinsurance Company states quite clear, and also the Beam Construction, Incorporated is listed as the certificate was being issued to and it sets forth quite clearly on that document that Diversified was the insured, the type of work that they were doing, work performed by New Jersey employees emanating from the state of New Jersey in connection with Hershey Medical Center, Hershey, Pennsylvania, and on that it is stamped quite clearly that "this policy provides coverage *only* under the Workers' Compensation law of the state of New Jersey and not" — the photocopy is bad.

MS. O'CONNELL: Under.

THE COURT: Is that what that is?

MS. O'CONNELL: Yes, Your Honor.

THE COURT: The "n" is missing. — "under the laws of any other state. If you must hire employees outside of New Jersey, coverage for those out-of-state employees must be secured elsewhere." That was sent to Diversified. We also have the —

MR. CRONIN: I'm sorry.

THE COURT: Well, that's May of '89 so that's after

The Court - Decision **[33]**

the accident.

MR. CRONIN: I'm sorry, Your Honor. You had indicated that that was sent to Diversified?

THE COURT: That's what it says. oh, I'm sorry, I'm wrong.

MR. CRONIN: It was sent to —

THE COURT: Beam.

MR. CRONIN: — Beam Construction in Hershey, Pennsylvania.

THE COURT: Right. It's the insured is Diversified. But there is another document in here which was — if I find it. That what happens when you read all this stuff in one night and then you come along and try to sort it out in a period of three hours. I understand that you've lived with this for some time.

MS. O'CONNELL: Perhaps I can help you, Your Honor.

THE COURT: Diversified was given notice prior to the accident. Can you help me?

MS. O'CONNELL: Notice of the termination?

THE COURT: Yes.

MS. O'CONNELL: That would be the January 20 letter that you previously —

MR. CRONIN: If the Court were talking about actual communications between the insured and the insurance company, I would direct the Court's attention to Exhibit J. That was a

The Court - Decision [34]

document that was received — apparently received by New Jersey Re on May 31st. It confirms a conversation on the 25th, five days after the accident.

MS. O'CONNELL: No, no, the accident was in March.

MR. CRONIN: Oh, I'm sorry, several days after.

MS. O'CONNELL: Months.

THE COURT: I don't know where I saw it now. on the law of agency, since I disagree with plaintiff's counsel that this was not the cancellation of an insurance policy; therefore, that 30 — what is it 3415-81?

MR. CRONIN: Yes, '81. Yes, Your Honor.

THE COURT: I got that right. — is not applicable since it was not a cancellation. It was a modification or an endorsement to a policy. So, I find that Section 81 would not be applicable to the facts of this case. Braishfield knew, I think, well, at least from January the 20th of 1989, that New Jersey Re was not covering employees working on a steady or regular basis in the state of Pennsylvania. They had the letter stating that a change would be made. That change was — the letter was dated January the 20th. If we give three days for the regular mail for Braishfield to get that letter, Braishfield then has from January the 24th to February the 24th to find the appropriate coverage for their client, Diversified Contracting. And evidently, Braishfield did nothing. I can only gather that Braishfield did nothing in response to that

The Court - Decision [35]

letter, and even after receiving the modification or the endorsement changing to no coverage for out-of-state work they still did nothing. As far as whether or not they — that was February the 24th, it was dated. Again, would give them three days to February 27th. Braishfield would have had that by February the 27th and nothing was done still until after the accident happened. In the Certificate of Insurance supplied by — I assume it was supplied by Braishfield, they list three companies as being afforded coverage; that being United Capital, GRE Albany, and New Jersey Reinsurance Company. In addition to that, we have the policy itself. Someone attached a copy of it to one of these pleadings.

MR. CRONIN: I direct the Court's attention to PA-68, Your Honor.

THE COURT: That's the complete policy?

MR. CRONIN: Yes, Your Honor.

MS. O'CONNELL: Or it's Exhibit A to my certification.

MR. CRONIN: Actually it starts at PA-64, Your Honor.

THE COURT: I marked one of these if I can find which one I marked.

(Pause)

(Tape off/on)

THE COURT: If you look at the policy in its entirety, I assume that it was issued with the original policy, and I'm looking at plaintiff's exhibit PA-64, would be actually PA-71

The Court - Decision **[36]**

of the exhibits attached by plaintiff where it states, "New Jersey Reinsurance Company, New Jersey part two of limited liability, this endorsement applies only to insurance provided by part two," et cetera. I think I read this before, but I will read it again. "We are not limiting their liability to pay damages for which we become legally liable to pay because of bodily injury to your employees," and then it goes on — the last part of that sentence, "subject to and is compensable under the Workers' Compensation law of New Jersey."

I thought I saw in another part in there that the policy was governed by the Workers' Compensation of New Jersey. I may have read that into something.

MS. O'CONNELL: Your Honor, you may be thinking of paragraph C of the general section appearing on page one or the first page of the jacket of the policy.

MR. CRONIN: PA-65, Your Honor.

THE COURT: Yes, I think — let me get the dec sheet. Yes, on the general provisions of the policy as issued it states, "Workers' Compensation law means the Workers' Compensation or Workmen's Compensation law and Occupational Disease law of each state or territory named in item 3A of the information page." And if you go to page — or to number 3A of the information page, I think it states quite clearly again

that the Workers' Compensation insurance part one of the policy applies to the Workers' Compensation law of the states listed here, and

The Court - Decision **[37]**

again that is New Jersey.

I put all of that together and I think it is clear that the New Jersey Workers' Compensation law would be applicable to this case, and the benefits which are payable under New Jersey Workers' Compensation would be the applicable provisions, and I think — I know counsel for plaintiff disagrees most strenuously of my recollection of the argument which took place on the 12th or 14th — 12th of May is clear that he felt the case of *Toebe* and —

MS. O'CONNELL: *Schmerbeck.*

MR. CRONIN: *Schmerbeck.*

THE COURT: — *Schmerbeck* were not applicable to this case, but I really — from the beginning of the reading of the case, when I read those two cases, I felt, you know, hey, it's right on point. Here we have an insurance company who writes a policy in New Jersey to cover a New Jersey insured. The other insurance was canceled. I realize that plaintiff, somewhere along this line, is probably — or Diversified anyway, if Diversified gets stung in this matter with having to pay from its pocket, that they definitely have a malpractice case if the statute is not rung against their insurance broker because he certainly let them down.

The policy is clear that the Workers' Compensation law of New Jersey is applicable and not that of Pennsylvania; therefore, he would be paid under the New Jersey Workers'

The Court - Decision **[38]**

Compensation law as it exists. He was hired here, the insured is here, the insurance company is here, he was injured in Pennsylvania. I think really if New Jersey Re were not being fair in this case, they could say, hey, we're not paying anything; we carried no insurance, but they have offered to pay under the laws of New Jersey which is a fair, just, and equitable thing to do in this case. We have an injured plaintiff or

plaintiff/petitioner who it's not his fault this situation came about. He did his job. He was hurt, and he's entitled to be compensated, but under which law? And under the law, again, counsel for plaintiff in the brief I received two days ago or Friday —

MR. CRONIN: Friday, Your Honor.

THE COURT: — Friday argues the third-party beneficiary aspect of this case which I don't find applicable. In there you cite two cases out of New York, New York — New York by statute says on life insurance, group policies like were set forth in that case, that when it changes, that all the members of that group have to be noticed. I don't think that's the law in New Jersey, and I don't think New Jersey has gone that far where every employee of every company must be noticed of every change in endorsements to policies. It would be a — the burden would probably be phenomenal, the paperwork would be another rain forest. It would have to be destroyed each year just to give notices to employees of endorsements added,

endorsements taken away, and that's not the law of this state. And I think in New York — it is in New Jersey as far as life insurance policies. I think that's pretty standard. If you're a member of a group and you're leading a group and the insurance, health carriers, as well as life insurance carriers, you're usually given notice that you have a right to pick up that policy as an individual just as New York does by statute. But in this case, I think it is definitely New Jersey law, and I think our New Jersey Workers' Compensation court should have jurisdiction over this matter; therefore, I will remand the matter to the Division of Workers' Compensation in the state of New Jersey. I don't know if my decision made sense or not. I tried to organize it —

(Tape off/on)

MS. O'CONNELL: You're also entering summary judgment and then remanding?

THE COURT: I'm just remanding.

MS. O'CONNELL: Well, Your Honor, the third-party complaint — the only relief that's requested in the third-party complaint is for defense and indemnity of Pennsylvania benefits which is why we asked for summary judgment.

THE COURT: Okay.

MR. CRONIN: Your Honor, —

MS. O'CONNELL: We're asking for summary judgment on the request for Pennsylvania benefits and a remand to the

Division which I think would certainly be appropriate in light of Your Honor's ruling.

MR. CRONIN: Your Honor, just so Your Honor knows, in light of the Court's decision, we're going to be amending the complaint to bring in the broker and I'm not sure whether that goes back down to the Division with this. I mean, it can bifurcate it or whatever, but I understand the Court's ruling as with regard to that particular party; however, we're going to have a motion which the Court can decide one way or another and that may resolve it. But I would ask the Court, if it were going to be ruling on this, at least allow us to file the motion to amend and add that party.

MS. O'CONNELL: Your Honor, Tarapacki and Diversified will still be in the case so there's no reason why NJ Re can't be — and NJ M, who obviously has no place in the case to begin with, can't be granted summary judgment.

THE COURT: Summary judgment will be without prejudice at this point. And the reason I say without prejudice is based upon what the Court has before it now, I am making my ruling because I think with what I have before me now, that is the proper ruling. But to do it with prejudice at this point in time based upon counsel's representation that a motion will be made to join an additional defendant, I'm never going to get — well, I guess you will have jurisdiction.

MR. CRONIN: Sure, they're New Jersey. Your Honor,

The Court - Decision **[41]**

they're a New Jersey company.

MS. O'CONNELL: one thing the Court should be aware of is that Diversified did file a lawsuit against Braishfield Associates in District court in Pennsylvania. Actually I think it was started in the Commonwealth court, was removed to District court, and that case has been resolved. I don't know the disposition of it. Both filed quite some time ago so I'm not sure that they'll be able to be brought into this suit after the resolution of that one. But be that —

THE COURT: Soon there will be a little collateral estoppel.

MR. CRONIN: There may be, Your Honor, but once again, I'm not even sure what litigation. I was made aware of some suit by somebody with regard to this broker, but the issue comes down to what about the rights of the plaintiff in this particular case.

MS. O'CONNELL: If I may, Your Honor, though, the fact that, you know, whatever Diversified and/or Tarapacki may do with respect to the broker, I'm not sure I understand why that would result in a summary judgment without prejudice to NJ Re and NJ M.

THE COURT: What if something appears in that case which would move responsibility from Braishfield to New Jersey Re?

MS. O'CONNELL: Well, then they can move to vacate the

The Court - Decision **[42]**

summary judgment. I mean, they always have that remedy under the court rules.

MR. CRONIN: Your Honor, it is still portions of — and, frankly, Your Honor, there are still portions of this case still standing. Any summary judgment motion which doesn't dispose of all parties and all issues is interlocutory and always subject to this Court's reconsideration.

THE COURT: Your motion for summary judgment will be granted without prejudice. This matter will be remanded to the Workers' Compensation Division of the state of New Jersey.

MS. O'CONNELL: Thank you, Your Honor.

THE COURT: If you ascertain that the matter between Diversified and Braishfield had a determination which would be collateral estoppel to this case, –

MR. CRONIN: Right.

THE COURT: – or even res judicata, then I will reconsider with prejudice so they give you something to look up.

MS. O'CONNELL: I think I can get that to the Court.

THE COURT: And if you would, whatever you ascertain, if you would be so kind as to advise the plaintiff's counsel.

MS. O'CONNELL: Certainly.

MR. CRONIN: As to the remand, Your Honor, I'd ask that to be stayed for 60 days to allow us to file the papers with regard to the agency?

The Court - Decision – [43]

MS. O'CONNELL: Your Honor, one doesn't have anything to do with the other.

THE COURT: Well, you're out so you don't have to worry about it.

MS. O'CONNELL: Well, we're not out because we're going to be in the Division and we want to get this thing moving.

THE COURT: You're in the Division?

MS. O'CONNELL: We're going to be.

MR. CRONIN: Well, if it isn't remanded until the Court decides that motion, you'll never wind up in the Division.

MS. O'CONNELL: That's not true.

THE COURT: What did you just say?

MS. O'CONNELL: The only reason why Diversified would want –

MR. CRONIN: If the Court doesn't remand the matter – if the Court issues an order granting summary judgment, they're out, but doesn't remand it until 30 days to allow us to file the motion, they're never going to wind up in the Division.

THE COURT: Which motion are you talking about filing?

MR. CRONIN: The motion to amend.

THE COURT: That has nothing to do with this.

MS. O'CONNELL: It doesn't have anything to do with it, Your Honor, and this should not be delayed any further.

The Court - Decision **[44]**

The remand should be effective —

THE COURT: Actually by you getting there earlier, you have a dollar amount that can be fixed that you can sue Braishfield for. one doesn't have anything to do with the other.

MR. CRONIN: I just ask for 30 days today. I mean, I understand the Court — you know, I mean, a half a dozen of one, six of the other, you know.

THE COURT: I will remand it.

MR. CRONIN: Thank you.

THE COURT: Okay?

MS. O'CONNELL: Thank you, Your Honor.

THE COURT: You're welcome.

*****

CERTIFICATION

I, Deborah Marziano, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Camden County Superior Court on May 24, 1995, Tape No. 8352L, Index No. 0005 to 3057, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

DEBORAH MARZIANO AOC #212

DIANA DOMAN TRANSCRIBING

DATE June 6, 1995

ORDER ON MOTION

TADEUSZ TARAPACKI
v
DIVERSIFIED CONTRACTING CO ETC

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6141-94T3
MOTION NO. M-5166-95
BEFORE PART: G
JUDGE(S): HAVEY
CONLEY
BRAITHWAITE

MOTION FILED: APRIL 24, 1996
BY: TADEUSZ TARAPACKI

ANSWER(S) FILED:
BY:

SUBMITTED TO COURT: MAY 1, 1996

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 10th DAY OF JUNE, 1996, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT – TO SUPPLEMENT THE RECORD	( )	(✓)	( )

SUPPLEMENTAL:

FOR THE COURT:

JAMES M. HAVEY P.J.A.D.

McELROY, DEUTSCH & MULVANEY
1300 Mt. Kemble Avenue
Post Office Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100
Attorneys for Third-Party Defendants,
NEW JERSEY MANUFACTURERS
INSURANCE COMPANY and
NEW JERSEY RE-INSURANCE COMPANY

TADEUSZ TARAPACKI,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: CAMDEN COUNTY
Plaintiff,	:	
	:	DOCKET NO. CAM-L-02362-90
v.	:	
	:	*Civil Action*
DIVERSIFIED CONTRACTING INC.,	:	
	:	ORDER GRANTING
Defendant	:	SUMMARY JUDGMENT
	:	
v.	:	
	:	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY and NEW JERSEY RE-INSURANCE COMPANY,	:	
Third Party Defendants.	:	
	:	

This motion for summary judgment was brought before the Court by Moria E. O'Connell, Esq., of McElroy, Deutsch & Mulvaney, counsel for third-party defendants New Jersey Manufacturers Insurance Company (NJM) and New Jersey Re-Insurance Company (NJRe) , on notice to Mark E. Belland, Esq. and Patrick T. Cronin, Esq. of Tomar, Siminoff, Adourian & O'Brien counsel for plaintiff, and John T. Kelley, Esq. of Saul, Ewing, Remick & Saul, counsel for defendant/third-party plaintiff Diversified Contracting. The Court considered the papers filed in support of the motion, any opposition filed thereto, and the oral argument of counsel and good cause appearing;

IT IS on this 24th day of May, 1995;

ORDERED that summary judgment is hereby granted to New Jersey Manufacturers and New Jersey Re-Insurance Company and this matter is remanded to the Division of Workers' Compensation for a determination of the benefits, if any, to which Tarapacki would have been entitled under the New Jersey Workers' Compensation Act.

_____

, J.S.C.

McELROY, DEUTSCH & MULVANEY
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(201) 993-8100
Attorneys for Third-Party Defendants,
NEW JERSEY MANUFACTURERS
INSURANCE COMPANY and
NEW JERSEY RE-INSURANCE COMPANY

TADEUSZ TARAPACKI,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: CAMDEN COUNTY
Plaintiff,	:	
	:	DOCKET NO. CAM-L-02362-90
v.	:	
	:	*Civil Action*
DIVERSIFIED CONTRACTING INC.,	:	
	:	AMENDED ORDER GRANTING
Defendant,	:	SUMMARY JUDGMENT
	:	
v.	:	
	:	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY and NEW JERSEY RE-INSURANCE COMPANY,	:	
Third Party Defendants.	:	
	:	

This motion for summary judgment was brought before the Court by Moira E. O'Connell, Esq., of McElroy, Deutsch & Mulvaney, counsel for third-party defendants New Jersey Manufacturers Insurance Company (NJM) and New Jersey Re-Insurance Company (NTRe), on notice to Mark E. Belland, Esq. and Patrick T. Cronin, Esq., of Tomar, Siminoff, Adourian & O'Brien, counsel for plaintiff, and John T. Kelley, Esq. of Saul, Ewing, Remick & Saul, counsel for defendant/third-party plaintiff Diversified Contracting. The Court considered the papers filed in support of the motion, any opposition filed thereto, and the oral argument of counsel and good cause appearing;

IT IS on this 24th day of May, 1995;

ORDERED that summary judgment is hereby granted, with prejudice, to New Jersey Manufacturers and New Jersey Re-Insurance Company and this matter is remanded to the Division of Workers' Compensation for a determination of the benefits, if any, to which Tarapacki would have been entitled under the New Jersey Workers' Compensation Act.

Charles A. Little, J.S.C.

LIBC-471 (REV. 10-87)

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 South Cameron Street, Room 103
Harrisburg, PA 17104-2501 (215) 560-2488

193-66-6914

RM-REVIEW

05/16/96
DATE OF CIRCULATION

PHILADELPHIA COUNTY

TADEUSZ TARAPACKI
3026 RICHMOND STREET
PHILADELPHIA PA 19134

vs

DIVERSIFIED
CONTRACTING INC
TWO EXECUTIVE DRIVE
MOORESTOWN NJ 08057

NEW JERSEY RELIANCE
INS. CO.
SULLIVAN WAY
WEST TRENTON NJ 08628

MICHAEL SILVER, ESQ.
8600 WEST CHESTER PIKE
UPPER DARBY PA 19082

RONALD BOVE, ESQ.
1600 LAND TITLE
BUILDING
100 S BROAD STREET
PHILADELPHIA PA 19110

THE ATTACHED DECISION OF THE JUDGE IS FINAL UNLESS AN APPEAL IS TAKEN TO THE WORKMEN'S COMPENSATION APPEAL BOARD AS PROVIDED BY LAW.

IF YOU DO NOT AGREE WITH THIS DECISION AN APPEAL MUST BE FILED WITH THE WORKMEN'S COMPENSATION APPEAL BOARD WITHIN 20 DAYS OF THE DATE OF THIS NOTICE.

FORMS FOR AN APPEAL MAY BE OBTAINED FROM THE WORKMEN'S COMPENSATION APPEAL BOARD, 1171 SOUTH CAMERON STREET, ROOM 305, HARRISBURG, PA 17104-2511

JUDGE OLLIE E ARRINGTON, JR.
BLJ

HEARING DATE(S): 10/26/95: C-1 received;
12/21/95: D-1 received.

CLAIMANT'S WITNESS AND EXHIBITS:

C-1 — New Jersey Reinsurance Company policy issued to Diversified Contracting, Inc.
Litigation Costs

DEFENDANT'S WITNESSES AND EXHIBITS:

D-1 — Deposition of Robert D. Benedict, November 2, 1995

RECORD

This matter comes before me on a remand from the Commonwealth Court of Pennsylvania to determine whether Defendant had insurance coverage for Claimant's work-related injury.

Claimant had originally filed a Claim Petition on April 13, 1989 alleging a work-related injury which occurred on March 20, 1989. Following hearings on this matter, the referee found that Claimant had sustained a disabling work injury, and awarded compensation benefits, in the amount of $399.00 per week. The referee also found that Defendant was uninsured to cover this loss, in violation of the Pennsylvania Workmen's Compensation Act. An a result of this finding, on July 14, 1989, the referee ordered a twenty percent (20%) penalty and attorney's fees for an unreasonable contest.

On October 5, 1990 Claimant filed a Review Petition, alleging that, at the time of his injury, Defendant was in fact insured — despite erroneous information to the contrary, supplied by the Compensation Rating and Inspection Bureau, which was relied upon by Claimant to his detriment. Following the hearing on the Review Petition, Judge Martin Burman held that the issue of insurance coverage could not be litigated due to the fact that the prior decision had not been appealed, and therefore operated as res judicata regarding the issue of insurance. The referee further found that the evidence of coverage which was submitted at the hearing on the Review Petition was available to Claimant at the time of his original Claim Petition.

Thereafter, Claimant appealed this second decision to the Workers' Compensation Appeal, which, by order dated June 23, 1993, affirmed Judge Burman's decision. Subsequently, Claimant appealed this decision to the Commonwealth Court of Pennsylvania.

Upon reargument, on April 14, 1994, the Commonwealth Court vacated the Appeal Board's ruling and remanded the matter to permit Claimant to litigate the issue of whether Defendant had insurance coverage for Claimant's work-related injury.

Following the ruling of the Commonwealth Court, Defendant filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied by Order of November 22, 1994.

The Appeal Board subsequently entered an Order on February 9, 1995, remanding the matter for further findings.

This matter proceeded to hearings before the undersigned Judge, and evidence was received. Based on the foregoing, this Judge makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. In support of his Petition, Claimant presented the workers compensation insurance policy issued by New Jersey Manufacturers/New Jersey Reinsurance Company, on November 17, 1988, to Defendant, Diversified Contracting, Inc. This policy provided coverage to Defendant from November 5, 1988 to November 5, 1989. The Policy, in the "Other States Insurance" endorsement, that said coverage applies to All states except NV, ND, OH, WA, WV, WY, TX, NJ. This policy thereby applies to the Workers' Compensation law of Pennsylvania.

2. In opposition to Claimant's Petition, Defendant presented the deposition testimony of Robert Benedict, underwriter for New Jersey Reinsurance Company. Mr. Benedict stated that the policy in question provided coverage under the laws of Pennsylvania (Benedict, pp. 8-9).

3. This Judge takes judicial notice of Pennsylvania Statute 40 P.S. Section 813 which states in pertinent that: "No policy of insurance under the Workers Compensation Act . . . shall contain any limitation of the liability of the insurer to an amount less than that for which the insured employer may become liable under such acts during the term of such insurance." Section 813 further provides that: "Except for non-payment of premiums, no policy of insurance issued or renewed against liability under the . . . "Pennsylvania Workmen's Compensation Act". . . may be cancelled or terminated by an insurer during the term of the policy".
4. In his deposition testimony, Mr. Benedict specifically stated that the policy in question was not cancelled for non-payment of premium (Benedict, pp. 26-27).
5. Under this analysis, the policy, which subjected the insurer to liability under the laws of the Commonwealth of Pennsylvania, could not be cancelled or terminated during the term of it's policy, which was in effect until November 5, 1989.
6. This Judge, therefore, makes a finding of fact that there was insurance coverage for Claimant's work-related injury.
7. Defendant has not established a reasonable contest of this claim, in that they have not presented any evidence in defense of this claim.
8. Claimant has incurred litigation expenses in the amount of $569.97.
9. Claimant has entered into an agreement with counsel whereby counsel is to receive twenty percent (20%) of Claimant's benefits as counsel fee. This fee agreement also provides that Claimant's counsel may receive twenty percent (20%) of the outstanding medical expenses.

CONCLUSIONS OF LAW

1. Both parties are bound by the provisions of the Pennsylvania Workers, Compensation Act, as amended.
2. Defendant had insurance coverage for Claimant's work-related injury.

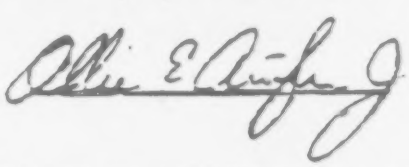
3. Pursuant to the order of July 14, 1989, Claimant is entitled to compensation at the rate of $399.00 per week, from March 21, 1985 continuing indefinitely into the future, with legal interest thereon.
4. Pursuant to the order of July 14, 1989, Defendant is liable for medical expenses which Claimant has incurred due to his work-related injury.
5. Pursuant to the order of July 14, 1989, a penalty in the amount of twenty percent (20%) of Claimant's weekly compensation is assessed against the Defendant, which sum is to be paid by the Defendant, in addition to Claimant's weekly benefits.
6. Defendant has not established a reasonable contest of this claim, therefore Claimant's attorney fees should be payable solely from Defendant, in the amount of twenty percent (20%) of Claimant's compensation.

ORDER

AND NOW, this 14th day of May, 1996, it is ORDERED that Defendant shall pay Claimant compensation at the rate of $399.00 per week commencing March 22, 1989 and continuing indefinitely into the future, with legal interest thereon at the rate of ten percent (10%) on the unpaid balance.

Defendant shall pay Claimant's medical expenses pursuant to the order of July 14, 1989.

Defendant shall pay all litigation costs as set forth in the Findings of Fact. The request of Michael N. Silver, Esquire, for counsel fees in the amount of twenty percent (20%) of Claimant's benefits is fair and reasonable, and is hereby approved. Said fee is to be paid directly by Defendant.



OLLIE E. ARRINGTON, JR.,
JUDGE

Supreme Court, U.S.
FILED
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CLERK

No. 96-1140

In The

Supreme Court of the United States

October Term, 1996

TADEUSZ TARAPACKI,

Petitioner,

vs.

NEW JERSEY ReINSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, Tadeusz Tarapacki, received and continues to receive Workers' Compensation benefits from respondent, New Jersey ReInsurance, in the amount set forth by court order. Accordingly, the questions raised by this Petition for Certiorari are:

1. May a petitioner seek relief from this Court when the underlying issue is moot, in violation of Article III of the United States Constitution?

2. May a petitioner seek review of a state court decision in which no federal question was raised or decided, in violation of 28 U.S.C. § 1257?

3. May a petitioner seek review of a state court decision that was decided on independent and adequate state grounds?

4. May a petitioner seek relief from this Court where the federal question raised is irrelevant to the disposition of this matter?

LIST OF INTERESTED PARTIES PURSUANT TO RULE 29.6

Petitioner, Tadeusz Tarapacki, is a natural person. Respondent, New Jersey ReInsurance Company, is a subsidiary of New Jersey Manufacturers Insurance Company, a New Jersey corporation. Respondent has no subsidiaries.

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Other Authority Cited:

New Jersey Workers' Compensation and Employer's Liability Insurance Manual, Part 3, § 14 3

Respondent, New Jersey ReInsurance Company (NJRe), submits this brief in opposition to this Petition for Certiorari, which seeks review of a judgment of the Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The New Jersey Supreme Court denied certification at 683 A.2d 1162 (1996), by an Order contained in the appendix to the Petition for Certiorari at 1a. In doing so, that court denied review of a judgment announced in an unreported opinion of the Superior Court of New Jersey, Appellate Division, Docket No. A-6141-94T3, located at 2a-12a of the appendix to the Petition for Certiorari.

STATEMENT OF JURISDICTION

Petitioner, Tadeusz Tarapacki, claims jurisdiction under 28 U.S.C. § 1257. His claim is unfounded. As set out below, the dispute between petitioner and NJRe is moot, because petitioner is receiving the payment that he seeks. Thus, this Court is without any case or controversy to adjudicate. Further, the federal questions that petitioner raises in this Petition for Certiorari were neither argued nor decided below and therefore were not preserved for this Court's review. As a result, this Court is without jurisdiction to hear this matter.

COUNTERSTATEMENT OF THE CASE

A. Overview

Petitioner's recitation of the issues presented contains numerous factual and legal misstatements. Those misstatements go to the heart of petitioner's claims before this Court. Because the record below demonstrates that the questions presented are

without merit — indeed, were never raised or adjudicated below as required under 28 U.S.C. § 1257 and relevant case law, as well under as Supreme Court Rule 14(1)(g)(i) — and also that this action is moot, the Court should deny the Petition for Certification.

Specifically, the issues that petitioner raises are moot because petitioner is receiving payment in the amount equal to that which sought through initiation of this action. Second, no federal question of full faith and credit was argued or decided below. Third, the state courts below decided this action on independent state grounds. Indeed, the sole issue before the Superior Court of New Jersey, Appellate Division, was an interpretation of NJRe's contract of insurance issued to petitioner's employer. (Petition 8a-9a (listing questions presented below).) Last, even if petitioner's full faith and credit argument could somehow be construed as properly before this Court, the question is irrelevant to the disposition of this case. As noted, the enforceability of petitioner's Pennsylvania judgment (which has been paid) in New Jersey is not part of this suit. Instead, the action below concerned only petitioner's rights against NJRe as assignee of his employer's contractual rights, which, because of the payment of the Pennsylvania judgment, are moot.

B. Diversified's Application for New Jersey Workers' Compensation Insurance

Petitioner's employer, Diversified Contracting, though its agent, Braishfield Associates, Inc., applied for a contract of workers' compensation insurance through the Compensation Rating and Inspection Bureau of New Jersey ("Rating Bureau"). That entity oversees the New Jersey Workers' Compensation Insurance Plan (the Plan), which is an assigned risk pool providing New Jersey workers' compensation and employers'

liability insurance to employers unable to obtain such coverage in the voluntary market. (Pet.'s App. Div. Apx. Pa218.) The Plan governs only liabilities under the *New Jersey* Workers' Compensation Act. It provides, in relevant part, as follows:

> **Preamble.** This Plan has been adopted by the insurance company members of the Compensation Rating and Inspection Bureau and approved by the Commissioner of Insurance for the benefit of employers subject to the New Jersey Workers Compensation law. It provides the means for an employer to satisfy the requirements of that law . . . .
>
> * * *
>
> 1. This Plan is available to any employer in good faith entitled to insurance under the New Jersey Workers Compensation Law, who is unable to secure insurance for their liability under that law and who does not have outstanding any uncontested unpaid premium in connection with any Workers Compensation and Employers Liability Insurance in effect during the two years immediately preceding.

(New Jersey Workers' Compensation and Employer's Liability Insurance Manual, Part 3, § 14.) The Rating Bureau assigns the insured to a participating insurer. That insurer plays no part in the application process. (Pet's App. Div. Apx. Pa 218.)

In its application dated September 21, 1989, Diversified identified only its Moorestown, New Jersey, headquarters as a

site to be insured. (Petition 3a.) Despite the fact that Diversified had existing operations in Pennsylvania (where Petitioner was employed), Diversified executed a certification to its application that stated that the disclosure was accurate and that it understood that the Rating Bureau would rely on the disclosure in assigning Diversified an insurer. Further, the certification disclosed that the policy issued would insure only New Jersey sites and that other arrangements were necessary for out-of-state operations. (Pet.'s App. Div. Apx. Pa 225.)

C. NJRe's Policy and Endorsement

Based on the information contained in the application, NJRe issued a policy of workers' compensation insurance with a policy period of November 5, 1988, to November 5, 1989. (Petition 3a.) That policy, as the court below found, provided insurance under the law of New Jersey. (*Id.* at 10a-11a.) It also provided "other States' Insurance," which is designed to provide the insured with coverage in certain designated states for new operations not in existence at the time the application is executed and for the insured's unexpected or temporary presence in those states. The policy provided such other states' insurance as follows:

> **A. How This Insurance Applies**
>
> 1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
>
> 2. If you begin to work in any one of those states and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in item 3.A. of the Information Page.

> 3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.

B. Notice

> Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

(*Id.* at 3a-4a.)

On November 17, 1988, NJRe sent a questionnaire to Diversified to verify information in Diversified's application. NJRe requested, among other things, the identification of all operations outside of New Jersey. Diversified's response, received by NJRe on January 3, 1989, revealed that Diversified had operations in Pennsylvania, Delaware, and Maryland. (*Id.* 4a.) That response was NJRe's first notice of Diversified's non-New Jersey operations. (See Pet.'s App. Div. Apx. Pa 231-32.)

On January 20, 1989, NJRe wrote to Braishfield, stating:

> We have recently become aware, via a Questionnaire recently returned by the insured, that this insured has operations in the States of Pennsylvania, Delaware and Maryland. In view of the fact that it is our intent to insure the obligations of this risk under the New Jersey Workers' Compensation Statute and not to insure the obligations under the laws of any other state, we wish to advise that we will be endorsing

> our contract effective 12:01 a.m. February 24, 1989 to reflect Item 3C- Other States Insurance as "NONE". It will be necessary for other arrangements to be made for any obligations this employer may have under the laws of any other state.
>
> Our endorsement will follow under separate cover.

(Petition 4a; Pet.'s App. Div. Apx Pa 234.)

On January 31, 1989, NJRe mailed to Braishfield the endorsement deleting Other States Insurance coverage. The endorsement was effective approximately one month later, on February 24, 1989. (Petition 4a.)

D. Notice to NJRe of Petitioner's Accident

Pursuant to Diversified's request, NJRe had issued a Certificate of Insurance dated March 7, 1989. NJRe sent that Certificate of Insurance to Braishfield. The Certificate stated:

> THIS POLICY PROVIDES COVERAGE *ONLY* UNDER THE WORKERS' COMPENSATION LAW OF THE STATE OF NEW JERSEY AND NOT UNDER THE LAWS OF ANY OTHER STATE. IF YOU MUST HIRE EMPLOYEES OUTSIDE OF NEW JERSEY, COVERAGE FOR THOSE OUT-OF-STATE EMPLOYEES MUST BE SECURED ELSEWHERE.

(Petition 5a (emphasis in original).) On March 20, 1989, Tarapacki was injured in Philadelphia, Pennsylvania. On April

13, 1989, Mr. Tarapacki filed a workers' compensation claim. Diversified answered that claim on May 8, 1989, stating that it had no workers' compensation insurance in Pennsylvania. (*Id.*)

On May 10, 1989, NJRe received a claim from Diversified in connection with the Tarapacki matter. NJRe responded on May 26, 1989, stating that it would process under the claim under its New Jersey policy only. On June 20, 1989, it agreed to pay the claim under New Jersey law. (*Id.* at 5a-6a.)

On July 14, 1989, the Pennsylvania Workers' Compensation Court made an award to Tarapacki, but found that Diversified had no workers' compensation insurance on the date of accident. Thereafter, on March 20, 1990, Tarapacki instituted suit against Diversified in the Superior Court of New Jersey, Law Division, Camden County, for enforcement of the Pennsylvania judgment. (*Id.* at 6a.)

The Law Division entered final judgment by default against Diversified on May 7, 1990. Diversified vacated that judgment on January 30, 1991. It answered Tarapacki's complaint and instituted a third-party action against NJRe and New Jersey Manufacturers Insurance Co. (NJM) on February 2, 1991, also in the Superior Court of New Jersey, Law Division, Camden County. (*Id.* at 6a-7a.)

NJM and NJRe filed answers and counterclaims on April 15, 1991, to which Diversified responded on May 6, 1991. On June 12, 1992, NJM and NJRe were granted summary judgment in the Superior Court of New Jersey, Law Division, Camden County, on grounds that the July 14, 1989, Pennsylvania Workers' Compensation Court finding of no insurance was *res judicata* against Tarapacki and Diversified. (*Id.* at 7a.)

On January 12, 1993, Tarapacki and Diversified entered a

consent judgment in the Superior Court of New Jersey, Law Division, Camden County, in favor of Tarapacki in the amount of $140,306.58. Diversified assigned to Tarapacki all its rights, including appeal of the summary judgment in favor of NJRe. Tarapacki appealed. (*Id.*)

The Commonwealth Court of Pennsylvania reversed the Pennsylvania Workers' Compensation Court on April 14, 1994, and remanded for a hearing on whether Diversified had Pennsylvania workers' compensation insurance on the date of Tarapacki's accident. Thereafter, on July 20, 1994, the Superior Court of New Jersey, Appellate Division, reversed the Law Division's grant of summary judgment and remanded for the question of coverage. The Appellate Division suggested a stay until the Pennsylvania Workers' Compensation Court's re-hearing was decided. On August 1, 1994, the Appellate Division denied NJRe's request for reconsideration and clarification. (*Id.* at 7a-8a.)

On May 24, 1995, at a second hearing in the Superior Court of New Jersey, Law Division, the court granted NJRe summary judgment and remanded to the New Jersey Workers' Compensation Division for determination of Tarapacki's benefits. Tarapacki filed a motion for leave to appeal in the Appellate Division on June 8, 1995. The Appellate Division granted Tarapacki's motion for leave to appeal on June 12, 1995, treating the motion as if it were an appeal as of right from final judgment. That appeal did not raise any questions of federal law. Instead, both the moving brief and the Appellate Division opinion were limited to the interpretation of the workers' compensation contract of insurance and the application of state law. (See *id.* at 8a-9a (listing issues raised by Tarapacki on appeal); Tarapacki's brief before the Superior Court of New Jersey, Appellate Division.)

On May 16, 1996, the Pennsylvania Bureau of Workers' Compensation issued an order finding that NJRe was liable to petitioner under the laws of Pennsylvania and ordering payment of $399 per week plus counsel fees. (Petition 48a-52a.) On June 18, 1996, the Superior Court of New Jersey, Appellate Division, affirmed the grant of summary judgment in favor of NJRe. (*Id.* at 2a.) Thereafter, NJRe began paying Tarapacki the amount of the workers' compensation award, plus fees. To date, the award totals over $250,000, including attorney's fees. On October 21, 1996, the New Jersey Supreme Court denied Tarapacki's petition for certification, which raised no federal question. (*Id.* at la.) Tarapacki filed this Petition for Certiorari on January 17, 1997.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES ARE MOOT.

This Court should deny the Petition because the issues raised before the Superior Court of New Jersey, Appellate Division, are moot. As noted, Tarapacki is receiving workers' compensation benefits from NJRe that equal the payments that he would receive if NJRe had actually issued a workers' compensation policy of insurance pursuant to Pennsylvania law. Yet under *United States National Bank v. Independent Insurance Agents of America,* 113 S. Ct. 2173 (1993), " '[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' " because " 'a federal court [lacks] the power to render advisory opinions.' " 113 S. Ct. at 2178 (second alteration in original) (quoting *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975)). A case or controversy requires the " 'pursuance of an honest and actual antagonistic assertion of rights by one [party] against another.' " *Id.* (quoting *Muskrat v. United States*, 219 U.S. 346, 359 (1911)). Here, simply put,

Tarapacki has no additional relief that he may seek from NJRe. Accordingly, the case is moot and this Court is without power to entertain it. *Church of Scientology v. United States*, 113 S. Ct. 447, 449 (1992) (stating that Court has "no authority" to render opinion on moot question).

II.

THE FEDERAL QUESTIONS OF FULL FAITH AND CREDIT WERE NOT ARGUED OR DECIDED BELOW.

For this Court to review the final judgment of a state court, some question of federal law must have been presented below. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). Indeed, where the opinion below does not " 'pass upon' " some federal question, this Court will " 'assume[ ] that the omission was due to want of proper presentation in the state courts.' " *Id.* at 495 (quoting *Street v. New York*, 374 U.S. 576, 582 (1968)). The Court thus "decline[s] to reach" claims "not raised and passed upon in state court." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *accord TXO Prod. Co. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (refusing to consider constitutional attack on jury instructions not raised in highest state court below); *Rigging v. Nevada*, 504 U.S. 127, 133 (1992) (declining to reach Eighth Amendment claim not raised before Nevada Supreme Court); *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (declining to reach substantive due process claim not raised below due to lack of jurisdiction under 28 U.S.C. § 1257); *Perry v. Thomas*, 482 U.S. 483, 492 and n. 9 (1987) (refusing to decide standing and unenforceability issues not raised below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)

("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."). Indeed, "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first in review of state court decision." *Cardinale*, 394 U.S. at 438.

Preservation of the federal question in the state proceeding from which review is sought is a necessary element of this Court's jurisdiction under 28 U.S.C. § 1257. *Yee*, 503 U.S. at 533 (discussing preservation of federal claim in state proceedings as requirement of "jurisdictional grant of 28 U.S.C. § 1257"); *Webb*, 451 U.S. at 495 (requiring, as matter of jurisdiction, petitioner to raise Constitutional claim in state court); *New York Times Co. v. Jascalevich*, 493 U.S. 1331, 1332 (1978) (discussing 28 U.S.C. 1257 as jurisdictional basis for review). Determining whether an issue was properly preserved is a federal question for this Court to decide. *Street*, 394 U.S. at 593. A state court decision cannot be said to have passed on federal questions that were never raised before it. *Bankers Life*, 486 U.S. at 79 n. 2 (" 'A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.' " (quoting *Dewey v. Des Moines*, 173 U.S. 193, 200 (1899)). Therefore, the Supreme Court Rules require a petitioner seeking review of a state court judgment to specify, with specific citations to the record below, when federal questions were raised below and how the state court below passed on them. Sup. Ct. R. 14.1(g)(i); *accord Webb*, 451 U.S. at 495 (discussing former R. 21.1(h)).

Underlying the requirement that federal questions be first raised in state court proceedings are "powerful policy considerations." *Webb*, 451 U.S. at 499. Those considerations include "comity to the States" and "a constellation of practical considerations." *Bankers Life*, 486 U.S. at 79. Comity to the states stems from the need to allow state courts an opportunity

to defend state law from federal challenges in order to preserve states' independent functioning and to allow them to construe state law so as to avoid challenges under federal grounds. *Webb*, 451 U.S. at 499-500. The "practical considerations" involve the proper development of the record below, which is necessary for correct adjudication of the federal questions raised before this Court. *Bankers Life*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439 ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind."). Also, litigation of the federal issues in state courts permits adjudication under state law, which "may well obviate any reason for [this Court] giving plenary consideration to the case." *Webb*, 451 U.S. at 501; *accord Cardinale*, 394 U.S. at 439; *see also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (stating that "finality requirement" of 28 U.S.C. § 1257 prevents "piecemeal review" of state court decision; avoids advisory opinions; and minimizes "federal intrusion into state affairs" by limiting review of state-court decisions).

As is clear, the requirement under 28 U.S.C. § 1257 that a federal question be raised and addressed by the state court below is no mere " 'technicalit[y] to be easily scorned.' " *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178, 180 (1952) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945)). The minimum requirement for jurisdiction under 28 U.S.C. § 1257 is that the record must make clear that a claim under a federal statute of the Federal Constitution " 'was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.' " *Bankers Life*, 486 U.S. at 77-78 (quoting *Webb*, 451 U.S. at 501). Moreover, the federal claim must have been presented to the state courts with sufficient specificity. A "vague appeal to

constitutional principles does not preserve [an] appellant's [constitutional] or due process claims. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Id.* at 77.

In a case presenting facts closely analogous to those contained in this Petition, the petitioner in *Webb* raised a question under the Full Faith and Credit Clause concerning the effect of a Florida judgment in later Georgia proceedings. Moreover, although she had used the term "full faith and credit" at several points in the state-court proceedings below, she never cited to the Federal Constitution or relied on cases discussing the clause. 451 U.S. at 496. Despite the respondent's failure to indicate in his opposing brief that the Full Faith and Credit issue had never been raised in the Georgia state courts, the Supreme Court determined, after it called for the record, "that the federal question was not raised below and that [the Court was] without jurisdiction in this case." 451 U.S. at 495. The Court accordingly ruled that it "must therefore dismiss without reaching the merits." *Id.*

Similarly, in *Bankers Life*, the petitioner, in a petition for rehearing below, claimed that a punitive damages award "violate[d] constitutional principles." 486 U.S. at 77. The Court rejected that "vague appeal" as insufficient to preserve his constitutional claims. *Id.*

Thus, for this Court to reach the merits of a federal question arising out of state court proceedings, the record must "clearly show[] that the federal issue has been properly raised below." *Id.* at 499. Specifically, the claim must " 'be brought to the attention of the state court with fair precision and in due time,' " which is accomplished "if the record as a whole shows whether expressly or by clear intendment" the federal question was

properly raised. *Street*, 394 U.S. at 584 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). The *Bankers Life* Court referred to that requirement as "the 'not pressed or passed upon below' rule." 486 U.S. at 79.

Here, the record below clearly demonstrates that petitioner failed to raise any federal issue of full faith and credit in the state proceedings below. The issues raised before the New Jersey Superior Court, Appellate Division, present questions under New Jersey and Pennsylvania statutes. Petitioner also challenged the trial court's interpretation of the contract of workers' compensation insurance, and argued against the application of New Jersey workers' compensation law. (Appendix to Petition 8a-9a; *see also* petitioner's brief to New Jersey Superior Court, Appellate Division at 9-25.) Nowhere in his brief to the New Jersey Superior Court, Appellate Division, did petitioner inject any federal question into his arguments on appeal. (Petitioner's brief to New Jersey Superior Court, Appellate Division at 9-25.)

As a result of that failure to raise federal questions in the state court proceedings, petitioner has failed to give the New Jersey court system an opportunity to defend its state laws against the challenge on federal issues that he now raises before this Court. *See Webb*, 451 U.S. at 499-500. Moreover, the record below is devoid of evidence, argument, and state-court reasoning on the subject, so that correct adjudication by this Court is impossible. *See Bankers Life*, 486 U.S. at 79. This record does not even present a general reference to the Federal Constitution such as that present in *Bankers Life*, 486 U.S. at 77 (declining to find federal question jurisdiction based on allegation below that punitive damages award "violates constitutional principles"). The record below cannot be said to show, " 'whether expressly or by clear intendment,' " that any federal question was properly raised in the state-court proceedings.

Street, 394 U.S. at 584 (quoting *Bryant*, 278 U.S. at 67). As a result of petitioner's failure to preserve any federal claim in the state proceedings below, this Court is without jurisdiction to grant certiorari, and it must deny this Petition on that ground alone.

III.

THE DECISION BELOW WAS DECIDED ON INDEPENDENT STATE GROUNDS, DEPRIVING THIS COURT OF JURISDICTION.

As this Court has recently stated, "[w]hen a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990). The presence of adequate and independent state grounds for a state-court decision presents a jurisdictional bar to this Court's review that must be considered before the Court can reach the merits of a case. *Id.* The Court can review a state-court decision only if that decision rests primarily on federal law or if state and federal law are " 'interwoven' " such that " 'the adequacy and independence of any possible state law ground is not clear from the face of the opinion.' " *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), *cert. denied*, 479 U.S. 1075 (1987).

As the opinion of the New Jersey Superior Court, Appellate Division, makes clear, the decision below rests entirely on contract interpretation and the application of state law. (Petition at 8a-12a.) Specifically, the court below interpreted a contract for workers' compensation insurance under N.J.S.A. 34:15-81, and did not address any issue of full faith and credit, which was not a point petitioner raised on appeal before that court. (Petition 8a-9a.) The court below makes no reference to any federal question. Petitioner never raised such issues in the state-court

proceedings below. Under *Rodriguez* and *Caldwell,* this Court is without jurisdiction to review the state court opinion below. As a result, it must deny this Petition for Certiorari.

IV.

EVEN IF A FEDERAL QUESTION OF FULL FAITH AND CREDIT WERE RAISED, IT IS IRRELEVANT TO THE DISPOSITION OF THIS MATTER.

As the text of the Appellate Division opinion makes clear, any question of federal law would be irrelevant to the state-court proceedings below. Petitioner's New Jersey state court proceedings do not arise out of his Pennsylvania judgment (entered against Diversified) but instead from his assignment of rights from Diversified based on the contract of insurance between Diversified and NJRe. Specifically, petitioner received a judgment in Pennsylvania that he reduced to judgment in New Jersey against his employer, Diversified. Diversified entered into a consent judgment in New Jersey whereby petitioner was assigned all of Diversified's contractual right against NJRe. As discussed throughout this brief, the state court decisions below considered only issues arising out of the contract of insurance. Because the validity of petitioner's Pennsylvania judgment against Diversified was never at issue, his full faith and credit issues (raised only before this Court) would be irrelevant to the proceedings below. The Court should therefore deny this Petition for Certiorari.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Certiorari.

Respectfully submitted,

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